FOR ARGUMENT

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Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-528

FEDERAL COMMUNICATIONS COMMISSION, *Petitioner*

v.

PACIFICA FOUNDATION, *Respondent*

On A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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BRIEF FOR PACIFICA FOUNDATION

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BRIEF FOR PACIFICA FOUNDATION

STATUTORY PROVISIONS INVOLVED

In addition to those constitutional and statutory provisions included at pages 2-4 of the Petitioner's brief, this case also involves Section 303(g) of the Communications Act of 1934, as amended, 48 Stat. 1082, 47 U.S.C. § 303(g), which provides:

> Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires shall—
>
> * * *
>
> * * * generally encourage the larger and more effective use of radio in the public interest.

COUNTERSTATEMENT OF THE CASE

This case presents the question as to whether the Federal Communications Commission (the "Commission") has the authority to proscribe the broadcast of specific words solely on the grounds that they are generally considered to be offensive without regard to the context in which the words are used. The factual context in which this question is presented is summarized below.

On February 22, 1975, the Commission released a *Memorandum Opinion and Order in the Matter of a Citizen's Complaint Against Pacifica Foundation, Station WBAI(FM) ("Order"),* wherein it declared certain words to be "indecent" within the meaning of that term as used in Section 1464 of the United States Criminal Code (18 U.S.C. § 1464) (App. 15-17, ¶¶ 11, 12 & 14).[1] The *Order* was issued in response to a listener's complaint concerning particular material broadcast over non-commercial educational FM Station WBAI, New York, New York, which is licensed to Pacifica Foundation ("Pacifica"), the Respondent herein.[2] The material complained of was a selection entitled "Filthy Words" from the record album "George Carlin Occupation: Foole," which had been recorded before a live audience at the Circle Theatre,

[1] Citations herein to the *Order* will refer to the paragraphs in the *Order*, as well as the pages in the Joint Appendix, where the cited material appears.

[2] Pacifica, a non-profit educational foundation formed in 1946, is dedicated to the operation of non-commercial radio stations. In addition to WBAI, it is the licensee of the following educational FM radio stations: KPFA and KPFB, Berkeley, California; KPFK, Los Angeles, California; KPFT, Houston, Texas; and WPFW, Washington, D.C.

San Carlos, California. This selection was broadcast over WBAI at approximately 2:00 p.m. on a weekday afternoon during the concluding portion of "Lunchpail," a regularly scheduled live program. The subject of "Lunchpail" on the day the selection was broadcast had been contemporary attitudes toward the use of language, and the program's host had presented his own commentary and analysis regarding this topic and discussed the matter by telephone with listeners. The host played the selection "Filthy Words" at the conclusion of the program because he regarded it as an "incisive satirical view of the subject under discussion." (App. 3). Immediately prior to the broadcast of the monologue, listeners were advised that it included language which some might regard as offensive. Those who might be offended were advised to change stations and turn back to WBAI in 15 minutes.

The Commission characterized the selection as a "comedy routine . . . almost wholly devoted to the use of such words as 'shit' and 'fuck,' as well as 'cocksucker,' 'motherfucker,' 'piss,' and 'cunt'" which used these words repeatedly "in a manner designed to draw laughter from [the] audience." (App. 8-9, ¶ 5). In response to an inquiry from the Commission concerning the complaint, Pacifica characterized the selection as a work by "a significant social satirist" which is intended to show that "words which most people use at one time or another cannot be threatening or obscene," and it contended that in the monologue "Carlin is not mouthing obscenities, he is merely using words to satirize as harmless and essentially silly our attitudes towards those words." (App. 10, ¶ 6).[3]

[3] The Commission in its brief (Pet. Br. 17) implies that Pacifica, in responding to the Commission's inquiry concerning WBAI's

Although the *Order* was issued by way of response to a listener complaint, the *Order* itself is not limited to the facts of the specific complaint. Rather, it was issued in conjunction with, and as an integral part of, the Commission's *Report on the Broadcast of Violent, Indecent, and Obscene Material ("Violence Report")*, 51 FCC 2d 418, which was submitted to Congress on February 19, 1975, in response to Congressional directives.[4] The *Violence Report* discussed the Commission's statutory responsibilities and authority with respect to the regulation of (i) violent and sex-oriented material and (ii) the use of obscene and indecent language.

In considering the subject of violent and sex-oriented material, the Commission observed that substantial evidence had been compiled regarding the harmful effects of televised violence on children. 51 FCC 2d at 418. The Commission, however, declared that it would

broadcast of the Carlin monologue, somehow admitted "that the words it had broadcast were offensive by contemporary community standards for the broadcast media" and that "the broadcast had occurred at a time when children undoubtedly were in the audience." The Commission arrives at this position by stating that Pacifica "*did not deny*" these assertions. The fact of the matter is that no such assertions were contained in the Commission's inquiry, nor was Pacifica requested to address itself to the specific assertions. The Commission's inquiry only asked for Pacifica "to submit comments" concerning the complaint. Accordingly, the fact that Pacifica's response "did not deny" certain of the facts underlying the Commission's subsequent *Order* cannot be construed as a tacit admission of such facts.

[4] The *Order* was included in the *Violence Report* as Appendix E.

be inappropriate for it to deal with these harmful effects through the regulation of program content since such regulation would raise "serious constitutional questions" and "could lead to extreme results which would be unacceptable to the American public." *Id.* at 419. In this regard the Commission pointed out that short of an outright ban on all forms of violent programming, "the question of what is appropriate for family viewing necessarily must be judged in highly subjective terms," *id.* at n. 5, and it further noted that it would be difficult to strike "an appropriate balance between the need to protect children from harmful material and the adult audience's interest in diverse programming." *Id.* at 420. Finally, the Commission declared that rules dealing with violent programming would "create the risk of improper governmental interference in sensitive, subjective decisions about programming, could tend to freeze present standards and could also discourage creative developments in the medium." *Id.* In view of these considerations, the Commission decided that it would be preferable to deal with the harmful effects of violent programming by encouraging the industry to engage in "self-regulation" rather than by "the adoption of rigid governmental standards." *Id.* at 419.

The constitutional constraints and other considerations which led the Commission to conclude that it would be inappropriate for it to deal with the harmful effects of televised violence through direct regulatory action did not, in the Commission's opinion, constitute any impediment to its taking affirmative regulatory action to deal with what it characterized as the "problem" of the broadcast of "indecent" language.[5] (App.

[5] Although the Commission asserts that "indecent language" has the "effect of debasing and brutalizing human beings" (App. 15,

6-7 & 18, ¶¶ 1, 2 & 16). The Commission explained the difference in its power to deal with what it regarded as the harmful effects of violent programming on the one hand and the "problem" of indecent language on the other by pointing to the fact that it has been given the affirmative duty to take direct action with respect to indecent language, whereas it had no such affirmative duty with respect to violent programming. The Commission found its statutory obligation in Section 1464 of the United States Criminal Code (18 U.S.C. § 1464) which makes it a crime to broadcast "indecent language"[6] and in Section 303(g) of the Communications Act (47 U.S.C. § 303(g)) which charges the Commission with the duty to "encourage the larger and more effective use of radio in the public interest." (App. 11 & 18, ¶¶ 7 & 16). In light of what it perceived to be its statutory obligations, the Commission concluded that it would be appropriate for it "to clarify the standards which [it] utilized to judge 'indecent language'" when carrying out these obligations. It was for this purpose that the *Order* was adopted. (App. 7 & 17, ¶¶ 2 & 15).[7]

¶ 11), it cites no evidence to support this assertion. No other harmful effects are attributed to "indecent" language by the Commission. The Commission identifies the broadcast of "indecent" language as a problem because "the Commission and the Congress have been receiving an increasing number of complaints concerning the use of indecent language on the public's airwaves." (App. 6, ¶ 1).

[6] Section 1464 also prohibits the broadcast of "obscene" and "profane" language, but the *Order* was not addressed to these aspects of the section. (App. 7 & 14, ¶¶ 2 & 10).

[7] It is not Pacifica's intention in highlighting the dichotomy between the Commission's approach to televised violence and its approach to the broadcast of "indecent language" to suggest that the Commission erred in concluding that it is barred by Section 326 of the Communications Act (47 U.S.C. § 326) from regulating the content of television programs. As this brief will demonstrate, the Commission correctly recognized in the *Violence Report* that Section 326 and the First Amendment bar it from regulating program content under the "public interest" standard of Section 303(g).

In the *Order*, the Commission defined "indecent" as referring to "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs." (App. 15-17, ¶¶ 11, 12 & 14). The Commission emphasized that "indecent language," as defined in the *Order*,

> is distinguished from obscene language in that (1) it lacks the element of appeal to the prurient interest . . . and that (2) when children may be in the audience, it cannot be redeemed by a claim that it has literary, artistic, political or scientific value.

(App. 15, ¶ 11). Thus, under the *Order*'s definition of "indecent" any and all uses of certain words which in their origin or some of their applications refer in a patently offensive manner to sexual or excretory functions or organs are banned whether such words, as actually used in context, describe sexual or excretory activities or organs or whether they are used colloquially in contexts where they cannot conceivably be construed as describing or even referring to sex or excretion. If one of the common usages of a given word is a synonym for a sexual organ or an excretory function, and if the word is also generally regarded as "patently offensive," the *Order* declares that the broadcast of such a word is a crime and contrary to the public interest, regardless of whether the use of the word causes, or could reasonably be expected to cause, injury or

harm to any hearer. The *Order* explicitly forbids the broadcasting of seven specific words,[8] thus creating an *Index Verborum Prohibitorum* to which more words will be added from time to time, presumably on the basis of rulings by the Commission concerning offending words brought to it for judgment.[9]

The *Order* is not at all clear as to the scope or sweep of its command. A great deal of emphasis was placed on the fact that when children may be in the audience offending language cannot be redeemed by the claim that it has literary, artistic, political or scientific value. There is a suggestion in the *Order* that should a licensee broadcast language of the sort encompassed by the Commission's definition of "indecent" during late evening time periods "when the number of children in the audience is reduced to a minimum," the Commission "might conceivably" consider whether material containing indecent language "has serious literary, artistic, political or scientific value" in determining

[8] The seven words are "fuck," "shit," "piss," "motherfucker," "cocksucker," "cunt" and "tit." These words according to the *Order* "depict sexual and excretory activities and organs in a manner patently offensive by contemporary community standards for the broadcast medium and are accordingly 'indecent' when broadcast on radio or television." (App. 16-17, ¶ 14).

[9] Subsequent to the release of the *Order*, a staff ruling on a listener's complaint suggested that the words "blow job" "may be indecent." (Letter dated May 28, 1975 from William B. Ray, Chief, Complaints and Compliance Division, Broadcast Bureau, to John Cervase, Esquire). The brief filed in this case by Morality in Media, Inc. as an *amicus curiae* clearly demonstrates that the process of adding to the index of proscribed words will continue. Morality in Media, Inc. lists not seven but *ten* words used in the Carlin monologue which is believes "fit the test." The words thus added are "turd," "twat," and "fart." Brief *Amicus Curiae* of Morality in Media, Inc., at 28 n. 29 and accompanying text.

whether a broadcast was in violation of Section 1464 or contrary to the public interest. (App. 15-16 & 18, ¶¶ 12 & 16).[10] The *Order,* however, makes no square holding on this point, and it leaves the matter in a state of limbo.[11]

The Commission's *Order* did not apply any specific sanctions to Pacifica, the Commission being content to utilize the *Order* as a vehicle to clarify applicable standards. However, the Commission pointedly declared that the *Order* would be associated with the station's license file and "in the event that subsequent complaints are received, the Commission will then decide whether it should utilize any of the available sanctions it has been granted by Congress." (App. 17, ¶ 14).[12]

The *Order* invited parties "who consider themselves aggrieved or who wish to call additional factors to the

[10] Under the Commission's formulation of the elements which constitute "indecency," there is no need of showing appeal to prurient interest whether the audience be composed of adults or children. The *Order* does not explain why the Commission believes that regulatory action is necessary or appropriate to protect adult audiences from offensive, but non-prurient, material.

[11] It should be noted that Commissioners Reid and Quello issued separate concurring statements wherein they took the position that words of the sort referred to in the *Order* have no place on radio or television in any context or at any time period. (App. 24 & 25). And, shortly after the release of the *Order*, the Commission's then General Counsel took the position before a group of broadcasters assembled for a workshop on "FCC Enforcement" at the National Association of Broadcasters' 1975 Annual Convention in Las Vegas, Nevada, that the broadcast of the Carlin selection at 2:00 a.m. would have been punishable. *Broadcasting*, April 14, 1975 at p. 40.

[12] The threatened sanctions are: (1) license revocation, (2) issuance of a cease and desist order, (3) monetary forfeiture, (4) denial of license renewal, (5) grant of only a short term license renewal. (App. 11, n. 3).

Commission's attention to seek reconsideration." (App. 17, ¶ 15). Pacifica declined this invitation and, instead, sought judicial review of the *Order*. However, the Radio Television News Directors Association ("RTNDA") petitioned the Commission for clarification or reconsideration. In its petition, RTNDA specifically requested that the Commission issue a ruling exempting news and public affairs programming from the sweep of the *Order*. In its *Memorandum Opinion and Order* disposing of RTNDA's petition (App. 41), the Commission adhered to its original *Order* and declined to discuss the *Order*'s scope any further "in the absence of a concrete factual context . . . ." (App. 43-44).[13]

On March 16, 1977, the court below issued an opinion setting aside the *Order* on the ground that it contravened Section 326 of the Communications Act which prohibits the Commission from censoring radio communications. (App. 45). The opinion of the court was delivered by Circuit Judge Tamm and joined in by Chief Judge Bazelon. A separate concurring opinion was also delivered by Chief Judge Bazelon in which he expressed the view that the *Order* violated the First Amendment as well as the no-censorship provision of Section 326. (App. 64). A dissenting opinion was filed by Judge Leventhal, expressing the view that the *Order* should have been affirmed as a proper exercise

[13] The Commission stated that it "would be *inequitable* for us to hold a licensee responsible for indecent language" broadcast in connection with *live coverage* of an event under circumstances where there "is no opportunity for journalistic editing." (Emphasis added). (App. 43, n. 1). The Commission cautioned licensees, however, that even "under such circumstances" they were to "exercise judgment, responsibility, and sensitivity to the community's needs, interests and tastes." (*Id.*).

of the Commission's regulatory responsibilities. (App. 91).

SUMMARY OF ARGUMENT

I.

The Commission's *Order,* far from being a narrow ruling directed to certain language "as broadcast," was in fact a broad-brush attempt to set a standard of "decency" applicable to all broadcasters. As the Commission twice stated in its *Order,* its primary purpose was to "review the applicable legal principles and clarify the standards which will be utilized [by the Commission] in considering the public's complaints about the broadcast of 'indecent' language." (App. 7-8, 17, ¶¶ 2 & 15). Further, in response to a request from the Radio Television News Directors Association for clarification of the *Order*'s scope, the Commission refused to limit the *Order*'s proscription against the broadcast of indecent language to the particular circumstances surrounding WBAI's broadcast of the Carlin monologue. Thus, the fact that the Commission's ban on indecent language happened to be articulated in the context of the disposition of a particular complaint does not limit the broad impact of the ban, and the Commission's attempt to limit it to the facts underlying the specific complaint against WBAI is both disingenuous and belated.

The standard of "indecency" adopted by the Commission not only prohibits the broadcast of the Carlin monologue, but also prohibits the unexpurgated broadcast of great works of classical and contemporary literature, including even passages from the *Bible.* Since context is irrelevant under the Commission's definition, political speeches, rallies, news events, and public

affairs programs and documentaries would also be subject to the censoring effect of the *Order*.

II.

The Commission's reliance upon Section 1464 of the Criminal Code (18 U.S.C. § 1464) as authority for its action banning the broadcast of "indecent" language is misplaced. Although Section 1464 prohibits the utterance of "obscene, indecent, or profane language by means of radio communications," the construction given to the Section 1464 term "indecent" in the Commission's *Order* is clearly precluded by this Court's decision in *Hamling* v. *United States,* 418 U.S. 87 (1974) and *United States* v. *12 200-Ft. Reels of Super 8mm Film,* 413 U.S. 123 (1973). *Hamling* and *12 200-Ft. Reels* clearly establish that when the term "indecent" appears in federal criminal statutes, the term must be construed as subsumed by the legal definition which this Court formulated for the term "obscene" in *Miller* v. *California,* 413 U.S. 15 (1973).

Section 1464 is a criminal statute. Therefore, assuming *arguendo,* that the term "indecent" as used in that section can be construed as having a meaning which is not entirely subsumed by the *Miller* definition of "obscene," the term must, nevertheless, be construed strictly and in a manner consistent with the definition which the courts have given the term in construing Section 1464 and other criminal statutes. *FCC* v. *American Broadcasting Co.,* 347 U.S. 284 (1954). The term "indecent" as used in federal and state criminal statutes has been invariably construed as referring to prurient material and utterances. The Commission expressly excludes "appeal to prurient interest" as an element of the definition of the term "indecent" formulated in its *Order*. (App. 15, ¶ 11). Accordingly, the Commission's definition of "indecent" is inconsistent with the definition which the courts have given to the term and thus cannot be sustained.

III.

The Commission's *Order* cannot be sustained on the theory that "unique qualities" of broadcasting provide a justification for the Commission's action banning the broadcast of "indecent" language. Underlying the Commission's reliance upon broadcasting's "unique qualities" as providing a basis for its action is its assumption that certain words can be banned, absolutely, without infringing upon the First Amendment's guaranties. The absurdity of this assumption has been clearly illustrated by this Court's decision in *Cohen* v. *California,* 403 U.S. 15 (1971). The fact that the Commission's *Order* is directed at expression in the broadcast medium does not, as the Commission maintains, render *Cohen* inapplicable to this case. This Court has pointed out that the basic principles of freedom of expression embodied in the First Amendment do not vary from medium to medium. *Southeastern Promotions, Ltd.* v. *Conrad,* 420 U.S. 546, 557-58 (1975); *Joseph Burstyn, Inc.* v. *Wilson,* 343 U.S. 495, 503 (1952). The "unique qualities" of the broadcast medium relied upon by the Commission as providing a basis for its action do not justify the application of different First Amendment standards in judging the validity of governmental suppression of broadcast expression than are applied in evaluating governmental regulation of expression in other media.

The scarcity of the radio spectrum which is cited by the Commisson as one of broadcasting's "unique qual-

ities" only provides, at most, a basis for governmental action aimed at maximizing First Amendment interests. *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367 (1969). Scarcity cannot provide a justification for the Commission action at issue in this case. That action suppresses expression in the broadcast medium and thereby aggravates, rather than alleviates, the problems created by spectrum scarcity.

The presence of unsupervised children in the audience, another "unique quality" relied upon by the Commission, plainly does not provide a valid basis for the Commission's action. In attempting to protect unsupervised children from exposure to "indecent," but non-obscene, language, the Commission's *Order* mandates that the content of radio and television broadcasts be restricted, at least during time periods when children may be in the audience, to material which is, in the Commission's view, suitable for children. The *Order,* thus, effectively reduces the adult portion of the radio and television audience to hearing and viewing "only what is fit for children." Such sweeping censorship of material based upon its supposed unsuitability for children represents a classic example of unconstitutional overbreadth. *Butler* v. *Michigan,* 352 U.S. 380 (1957).

The Commission's reliance upon *Miller* v. *California,* 413 U.S. 15 (1973) and *Ginsberg* v. *New York,* 390 U.S. 629 (1968) as supporting its contention that its *Order* may be sustained as a valid exercise of governmental power to protect children from exposure to unsuitable material is clearly misplaced. *Miller* and *Ginsberg* stand only for the proposition that the dissemination of "sexually explicit materials" which are both

prurient as to minors and which lack substantial artistic, literary, political or scientific value as to minors may constitutionally be restricted under a narrowly drawn regulation even though the materials are not legally obscene as to adults. Since the Commission's *Order* seeks to ban all "indecent" language without regard to whether it is "sexually explicit" or whether it is prurient and without regard to the context in which it is used, *Miller* and *Ginsberg* are obviously inapposite.

There is no merit to the Commission's contention that its action can be justified on the grounds that it is designed to protect children from being exposed to language which "most parents regard as inappropriate for [children] to hear." Not only is there no evidentiary basis for the Commission's assumption about the type of language which "most parents" would not want their children to hear, but even assuming the Commission's assumption were correct, the Commission's action would be barred as an unconstitutional intrusion into the role of parents in supervising their children's upbringing. *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972); *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925).

Finally, there is clearly no merit to the Commission's claim that the broadcast of "indecent" language can be banned because radio and television receivers are generally found in the home "where individual rights to privacy are entitled to particular respect." Radio and television broadcasts do not intrude into the privacy of the home; they are invited into the home by the householder who is entirely free to "twist the dial to cut off an offensive or boring communication and thus bar its entering his home." *Rowan* v. *Post Office De-*

partment, 397 U.S. 728, 737 (1970). In its *Order,* the Commission has "twisted the dial" for the householder. Such action is the very essence of censorship and thus cannot be sustained.

ARGUMENT

As reflected in the Commission's statement of the "questions presented" (Pet. Br. 2), two distinct questions are presented by this case. The first question is whether the Commission's action banning the broadcast of "indecent," but "non-obscene," language can be sustained as a valid exercise of its responsibility under Section 303(g) of the Communications Act (47 U.S.C. § 303(g)) to regulate broadcasting "in the public interest." The second question is whether the Commission's action constituted a valid exercise of its authority to construe and enforce the prohibition against utterance of "indecent . . . language by means of radio communications" found in Section 1464 of the Criminal Code (18 U.S.C. § 1464). The Commission's brief does not discuss these questions separately, but rather treats the question of its authority to ban broadcasting of "indecent" language "in the public interest" in the context of its discussion of what it perceives to be its authority under Section 1464.[14] Nevertheless, Pacifica believes that the two questions raise substantially different issues requiring different analyses. Accordingly,

[14] In its *Order* (App. 18, ¶ 16), the Commission expressly asserted that the action taken therein could be sustained without regard to Section 1464 of the Criminal Code, as a valid exercise of its responsibility pursuant to Section 303(g) of the Communications Act to "encourage the larger and more effective use of radio in the public interest."

in this brief the Commission's contention that its *Order* banning the broadcast of "indecent" language can be sustained as a valid exercise of its responsibility to regulate broadcasting in the "public interest" will be considered separately from the question of whether Section 1464 empowers the Commission to impose such a ban.[15]

[15] Other important questions, not directly raised by this case, lurk in the Commission's *Order.* Most significantly, a serious question exists as to whether Commission consideration of specific offensive program content in the context of a license renewal or similar administrative proceeding would comply with constitutionally mandated procedural requirements. *See Illinois Citizens Committee for Broadcasting* v. *FCC,* 515 F.2d 397, 403 (D.C. Cir. 1975); Comment, *Morality and the Broadcast Media: A Constitutional Analysis of FCC Regulatory Standards,* 84 Harv. L. Rev. 664, 694-99 (1971). In a renewal proceeding the burden of proving that renewal is in the public interest is on the licensee. A licensee accused of broadcasting "indecent" programming must then prove that its programming was not "indecent." The chilling effect on the exercise of First Amendment rights of forcing the citizen to prove his speech is protected has been held to be unconstitutional in a variety of factual settings. *Freedman* v. *Maryland,* 380 U.S. 51 (1965) (state film censorship board must bear burden of proving material is obscene); *Speiser* v. *Randall,* 357 U.S. 513, 526 (1958) (state cannot place burden on taxpayer to prove that he is not a criminal syndicalist as a condition of qualifying for a tax exemption). Additionally, censorship or other administrative proceedings regulating speech must make provision for prompt judicial review of findings. *Southeastern Promotions, Ltd.* v. *Conrad,* 420 U.S. 546 (1975) (burden of establishing legality of prior restraint must be borne by the state which must initiate judicial proceedings to prove that material is not constitutionally protected); *Blount* v. *Rizzi,* 400 U.S. 410 (1971); *Freedman* v. *Maryland, supra; Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58 (1963). Not only is such review not provided for by the Commission's *Order,* but the presence of additional factual issues justifying a Commission decision not to renew a license based, in part, upon a Commission finding that the licensee's programming was "indecent" might effectively preclude *any* judicial review of whether the particular programming was protected. *See, e.g., United Broad-*

I. The Commission's Declaratory Order Cannot Be Construed As A Narrow Application Of Section 1464 To A Specific Set Of Facts.

In order to provide a framework for the discussion of the legal principles applicable to this case, it is necessary to discuss briefly the scope and effect of the Commission's *Order*. The court below found that the *Order* "prohibits the broadcast of seven words at times of the day when there is a reasonable risk that children will be in the audience [and] [t]hus . . . sweepingly forbids any broadcast of the seven words irrespective of context or however innocent or educational they may be." (App. 60). Based upon this reading of the *Order*, the court below set it aside as "overbroad," noting that "[c]learly every use of these seven words cannot be deemed offensive even as to minors," and as "vague," citing this Court's holding in *Rowan* v. *Post Office Department*, 397 U.S. 728 (1970) that "in assessing the requisite capacity of individual choice the age of the minor is a significant factor" and noting that the *Order* "fails to define children" or to "even consider age a significant factor." (App. 60-61).

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casting Co. v. *FCC*, No. 76-1570 (D.C. Cir. 1977), *cert. denied*, 46 U.S.L.W. 3466 (U.S. Jan. 23, 1978) and *Robinson* v. *FCC*, 334 F.2d 534 (D.C. Cir.), *cert. denied*, 379 U.S. 843 (1964). (In *United*, the court declined to review a Commission determination that certain broadcasts claimed by the licensee to be religious in nature contained objectionable material not protected by the First Amendment, and in *Robinson* the court declined to review a Commission determination that certain programming was indecent, holding in both cases that questions of the constitutional validity of the Commission's conclusions that the content of the licensee's programming provided a basis for denying renewal of license did not have to be reached since independent grounds for nonrenewal of license existed.)

The dissenting judge below read the *Order* as holding "only that the language *as broadcast* was indecent and prohibited by 18 U.S.C. 1464." (App. 93-94).

In its brief to this Court, the Commission, relying heavily on the dissenting judge's reading of the *Order*, argues that the intent and effect of the *Order* was only to resolve "a specific complaint" regarding the language used in the Carlin monologue "as broadcast" over WBAI.[16] (Pet. Br. 41-44). It is clear, however, that both the intent and the effect of the *Order* are vastly broader. The *Order* was not issued solely, or even primarily, for the purpose of resolving the specific complaint lodged against WBAI as a result of its broadcast of the Carlin monologue. Rather, as set forth both in the *Order*'s introduction and again in its conclusion, its primary purpose was to "review the applicable legal principles and clarify the standards which will be utilized [by the Commission] in considering the public's complaints about the broadcast of 'indecent' language." (App. 7-8, 17, ¶¶ 2, 15).

The *Order* defined the term "indecent" as referring to "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory

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[16] The Commission did not argue in its brief below that the *Order* was limited to the monologue "as broadcast," and it first advanced its "as broadcast" theory in its Petition for Rehearing and Suggestion for Rehearing en Banc. (App. 117 & 118). While Pacifica believes it is important to a full understanding of this case that the scope of the Commission's *Order* be clearly understood, the legal principles discussed *infra* would render the *Order* invalid even if it could be read in the narrow manner in which the Commission now urges it should be read.

activities and organs.'" (App. 14-17, ¶¶ 11, 12 & 14). Moreover, the *Order* emphasized that "indecent language" as defined therein

> is distinguished from obscene language in that (1) it lacks the element of appeal to the prurient interest . . . and that (2) when children may be in the audience, it cannot be redeemed by a claim that it has literary, artistic, political or scientific value.

(App. 15, ¶ 11). Since the *Order* unequivocally states that, at least at times when children may be in the audience, context is utterly irrelevant in determining whether particular language is "indecent," the Commission cannot be heard to argue that the *Order*'s definition of "indecent" was applicable only to the Carlin monologue "as broadcast" over WBAI.[17] Nor can the Commission be heard to argue (Pet. Br. 43-44) that Pacifica somehow acted improperly, and may even have misled the court below as to what this case is

[17] The Commission asserts in its brief (Pet. Br. 45) that the words broadcast by WBAI were "patently offensive by *its* community's contemporary standards." (Emphasis added). This is a serious misrepresentation of the facts of this case. The Commission did not attempt to ascertain whether any of the words used in the Carlin monologue were "patently offensive" according to the contemporary community standards of WBAI's city of license, New York, and the record is entirely silent on this question. Moreover, it is obvious from the *Order* that the Commission was relying on a national standard of "patent offensiveness" which it believed to be susceptible of official notice since it declared the specific words used in the Carlin selection to be indecent as a matter of law. (App. 16-17, ¶ 14).

[18] Although the Commission argued in its brief to the court below that "the lengthy compilation of allegedly prohibited quotations" which Pacifica submitted in an appendix to its brief represented "a serious misinterpretation of the Commission's *Order*," the Commission did not attempt to explain how the materials quoted in Pacifica's appendix could escape the *Order's* proscriptions.

about, when "it placed before the court . . . in a separate appendix a host of literary, dramatic, poetic, and religious works which were allegedly banned by the Commission's ruling" without having first brought the materials listed in the appendix to the Commission so that it could rule on them, independently, to determine whether it "had intended to reach them with its prohibition.'"[19] In any event, although Pacifica did not itself seek reconsideration of the *Order*, the Commission was afforded an opportunity to clarify the *Order*'s scope in the context of a "Petition for Clarification or Reconsideration" filed by the Radio Television News Directors Association ("RTNDA"). In its petition, RTNDA sought

> a ruling to the effect that the Commission "does not intend to apply its definition of indecent language so as to prohibit the broadcasting of indecent words which might otherwise be reported as a part of a bona fide news or public affairs program."

[19] The separate appendix which Pacifica submitted to the court below listed examples of materials containing language within the *Order*'s definition of "indecent." It is reproduced at pages 1a-19a of the Addendum to this brief. This Addendum is merely illustrative of the types of materials affected by the *Order*'s unqualified and unambiguous proscription of the broadcast, without regard to context, of language coming within its definition of "indecent." In view of the fact that the Commission has reproduced for this Court (Addendum to FCC Petition for Certiorari), as it did for the court below, transcripts of broadcasts presented by an educational station in no way involved in this case for the purpose of illustrating "a logical extension of Pacifica's abstract principle" (Pet. Br. 28 n. 23), the Commission cannot be serious in suggesting (Pet. Br. 22 n. 21) that Section 405(a) of the Communications Act (47 U.S.C. § 405(a)) somehow precluded the court below from taking note of the materials listed in Pacifica's appendix.

(App. 42). RTNDA specifically noted that language appearing in the Nixon tapes would be definable as "indecent" under the Commission's standard. (RTNDA Petition at 5-6.) In response to the RTNDA petition, the Commission noted (App. 43-44) that its *Order* had

> intimated that such language could be broadcast —in a news or public affairs program or otherwise —*when the number of children in the audience was reduced to a minimum,* if sufficient warnings were given to unconsenting adults and if in the context used the language had serious literary, artistic, political or scientific value[.]

(Emphasis added). However, the Commission declined to discuss the scope of the *Order* further "in the absence of a concrete factual context . . . ." (App. 44). Moreover, while the Commission observed in a footnote that it "would be *inequitable* for us to hold a licensee responsible for indecent language" broadcast in the context of live public events where no opportunity existed "for journalistic editing" (App. 43 n. 1) (emphasis added), it pointedly refused to *rule* that live broadcasts were outside its definition of "indecent" and, implicitly if not explicitly, did rule that broadcasts of *recorded* news and public events were prohibited if they contained the offending words. The Commission's treatment of the RTNDA petition leaves no doubt that the Commission intended the *Order* to be understood as formulating a definition of "indecent" which would be of general applicability (even to news and public affairs programs), not one that was applicable only to the specific broadcast referred to it by a specific complaint.

As the court below recognized (App. 54), the *Order* "proscribes the uncensored broadcast of many of the great works of literature including Shakespearian plays and contemporary plays which have won critical acclaim, the works of renowned classical and contemporary poets and writers, and passages from the *Bible*."[20] The *Order* also proscribes the broadcast of the words in question in the context of the White House tapes,[21] in the course of covering a political speech, rally, or news events (except where coverage is live and circumstances render "journalistic editing" impossible), in the context of a public affairs documentary, or in the context of any other news or public affairs program.[22] Moreover, although the Commis-

[20] Examples of the use of the words defined by the Commission as "indecent" in the *Bible* and in literary works are collected in the Addendum hereto at 1a-12a. These examples are presented for illustrative purposes only and do not purport to be exhaustive of the field.

[21] Examples of the use of the words in question in the context of the Nixon tapes are set forth in the Addendum hereto at 12a-13a.

[22] Examples of the use of the words in question by newspapers and magazines in the course of reporting news stories and in articles dealing with social or political issues are set forth in the Addendum hereto at 13a-19a. The news story (Addendum at 13a-14a) which appeared on the front page of the March 19, 1975 edition of the Dayton, Ohio, *Journal Herald* and which included expurgated excerpts from an affidavit recounting the events leading up to the fatal shooting of a Treasury agent by a fellow agent is but one illustration of a situation where a responsible journalist could reasonably conclude that it was necessary and appropriate to use what is often regarded as one of the most offensive of words in reporting the news. The journalistic considerations and judgments which led to the decision by the editor of the *Journal Herald* to publish excerpts from the affidavit, "including in one instance the raw vulgarity used by a man blind with rage" because he believed the incident presented "a lesson that every man, woman and child should perceive in all its dimen-

sion's action affects a wide range of political, artistic, and literary expression, its impact is likely to fall most heavily upon expression by persons belonging to groups and subcultures within American society who may not share the dominant culture's view of which words or expressions are "acceptable" [23] and who, in order to express themselves, use words which may be regarded as offensive by persons from different socio-economic backgrounds.[24] Such use may arise from an

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sions," were discussed in an article by *Washington Post* Associate Editor Charles B. Seib entitled "Dirty Words" which appeared on the editorial page of that newspaper on April 16, 1975 and in an article entitled "Ohio: Printing The Obscenity" which appeared in the July/August 1975 edition of the *Columbia Journalism Review* at pp. 15-17. Mr. Seib's article is reproduced in the Addendum hereto at 17a-19a.

[23] *See Cohen* v. *California*, 403 U.S. 15, 25 (1971) where this Court observed that, "while the particular four-letter word being litigated here ['Fuck the Draft'] is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric."

[24] Such groups and subcultures may be separated from the dominant culture on the basis of any number of factors, *e.g.*, by age, by race, by income, by ethnic origin. For example, the use by some blacks of certain language considered taboo in conventional, white society has been the subject of academic analysis. *See* Carolyn Fitchett Bins, "Toward an Ethnography of Contemporary African American Oral Poetry," printed in *Language and Linguistics Working Papers No. 5* (Georgetown Univ. Press, 1972) at 76-94. In discussing the use in black oral poetry of "words and expressions considered taboo in the dominant culture," Ms. Bins observes that "what is 'acceptable' must be determined by the community in which the speech event takes place, not by an investigator's own cultural values about its quality or acceptance," and she points out that "[w]ords generally considered obscene like 'bullshit' and 'fuck' are considered neither obscene nor derogatory in the [black] vernacular except in particular contextual situations and when used with certain intonations." *Id.* at 82. *See also* Dillard, *Black English* (1972); Jackson, *Get Your Ass in the Water and Swim Like Me* (1974); Labov, *Language in the Inner City: Studies in the Black English Vernacular* (1972).

innocent reliance on the vocabulary of one's peer group, or it may form part of an intentional effort to challenge the sensibilities or underlying concepts of the dominant culture. Whatever may be the case, the Commission's action withdraws these words from the available broadcast vocabulary of these groups.

II. Section 1464 Of The Criminal Code Does Not Empower The Commission To Regulate Expression Which Is Not Obscene.

The Commission contends that Section 1464 of the Criminal Code (18 U.S.C. § 1464) confers upon it both the authority and the affirmative responsibility to excise from the public airwaves offensive, but non-obscene, language. The Commission's reliance upon Section 1464 is based upon the fact that Section 1464 proscribes the utterance of "obscene, indecent, or profane language by means of radio communication" [25] and its belief that this Court's decisions in *Hamling* v. *United States*, 418 U.S. 87 (1974) and *United States* v. *12 200-Ft. Reels of Super 8mm Film*, 413 U.S. 123 (1973) do not preclude the formulation of a definition of the term "indecent" tied to what the Commission perceives to be the "unique qualities" of the broadcast medium which is separate and distinct from the meaning this Court has given to the term "obscene."

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[25] Although the Commission states in its brief (Pet. Br. at 40) that Section 1464 "applies only to the broadcasting media, which for [a] variety of reasons . . . are different from other modes of expression and therefore warrant different treatment," Section 1464 actually applies to all forms of communications by radio. Thus, if the Commission's definition of "indecent" as used in Section 1464 were sustained, it would be applicable to citizens band, shipboard, and business radio, point-to-point communications, and all other forms of communications by radio, regardless of whether the particular form of communication possessed any of the "unique qualities" which the Commission attributes to broadcasting.

The discussion which follows will show that: (1) *Hamling* and *12 200-Ft. Reels* do preclude the Commission from construing "indecent" as meaning anything other than "obscene," and (2) even assuming, *arguendo,* that "indecent" could be construed as having a meaning which is not entirely subsumed within the term "obscene," the definition of "indecent" set out in the Commission's *Order* which rests solely on the presumed patent offensiveness of language describing "sexual or excretory activities [or] organs" is inconsistent with the definition which the term has been given through the process of judicial interpretation and, thus, cannot be sustained. *FCC* v. *American Broadcasting Co.,* 347 U.S. 284 (1954).

A. *Hamling* AND *12 200-Ft. Reels* REQUIRE THAT "INDECENT" AS USED IN SECTION 1464 BE CONSTRUED AS MEANING OBSCENE.

This Court has twice held that where the term "indecent" is used in a federal statute to describe types of expression which will subject persons to criminal penalties, the term must be construed as referring only to " 'patently offensive representations or descriptions of that specific "hard core sexual" conduct given as examples in *Miller* v. *California* [413 U.S. 15 (1973)].' " *Hamling,* 418 U.S. at 114, *quoting 12 200-Ft. Reels,* 413 U.S. at 130 n.7.

Hamling, a case decided *after* the series of intermediate court cases cited by the Commission (Pet. Br. 29) as having "indicated that 'indecent' had a separate and distinct meaning from 'obscene' in Section 1464," involved convictions under Section 1461 of the Criminal Code (18 U.S.C. § 1461) which prohibits the mailing of material which is "obscene, lewd, lascivious, indecent, filthy or vile." Those convictions were challenged on the grounds that the section was unconstitutionally vague because it neither referred by its terms to material involving the specific types of explicit sexual conduct defined as obscene in *Miller* v. *California,* 413 U.S. 15 (1973), nor had it been construed as applying only to material involving such conduct. The opinion of the Court in *Hamling* pointed out that even prior to *Miller* the various terms employed in Section 1461 had been "authoritatively construed [by the Court] in a manner consistent with *Miller.*" 418 U.S. at 112. The Court further observed:

> *Miller* undertook to set forth examples of the types of material which a statute might proscribe as portraying sexual conduct in a patently offensive way . . . , and went on to say that no one could be prosecuted for the "sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed."

Id. at 113-14. The opinion then referred to the Court's statement in *12 200-Ft. Reels,* 413 U.S. at 130 n. 7, making clear the Court would construe the terms "obscene," "lewd," "lascivious," "filthy," "indecent," and "immoral" when used in federal statutes describing criminal conduct as referring only to "patently offensive representations or descriptions of that specific 'hard core' sexual conduct given as examples in *Miller* v. *California,*" and the Court concluded "[w]e now so construe the companion provision in 18 U.S.C. § 1461 . . . ." [26] 418 U.S. at 114.

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[26] In *United States* v. *12 200-Ft. Reels of Super 8mm Film,* 413 U.S. 123 (1973), the Court had referred to the use of "the words

In view of *Hamling* and *12 200-Ft. Reels,* the Commission's contention that "indecent" as used in Section 1464, "a companion provision" to Sections 1461 and 1462, can be construed, consistently with the Constitution, as making it a crime to engage in non-obscene expression cannot be sustained. While the Commission is technically accurate in pointing out that neither *Hamling* nor *12 200-Ft. Reels* "make any reference whatsoever to Section 1464 or to radio communication" (Pet. Br. 27-28), this fact is obviously irrelevant. In both cases, this Court's concern was with the problem of how to give the term "indecent" and other terms used in federal statutes to describe expression which could subject persons to criminal penalties a sufficiently precise and limited meaning so as to meet First Amendment and due process requirements. This problem of precision of definition does not vary from medium to medium, and the "limiting definition" which the Court gave to the term "indecent" was clearly intended to apply to all federal criminal statutes employing that term.[27]

'obscene,' 'lewd,' 'lascivious,' 'filthy,' 'indecent,' or 'immoral' as used to describe regulated material in 19 U.S.C. § 1305(a) and 18 U.S.C. § 1462." 413 U.S. at 130 n. 7.

[27] In a recent decision setting aside a jury conviction for uttering "indecent" language over a citizens band radio in violation of Section 1464, the United States Court of Appeals for the Seventh Circuit held, based upon *Hamling,* that the term "indecent" as used in Section 1464 has the same meaning as the term "obscene." *United States* v. *Simpson,* 561 F.2d 53 (7th Cir. 1977). The fact that the "term 'indecent' in 18 U.S.C. 1464 was . . . construed as synonymous with 'obscene' " in *Simpson* was cited in the Senate Judiciary Committee's report relative to the proposed Criminal Code Reform Act (S. 1437) which would transfer Section 1464 to the Communications Act without substantive change. Report of the Committee on the Judiciary to Accompany S.1437, 95th Cong. 1st Sess., at 855 n. 100 (1977).

B. Statutory Construction Forecloses Any Definition Of "Indecent" Which Does Not Include The Element Of Appeal To Prurient Interest.

Assuming, *arguendo,* that the term "indecent" as used in Section 1464 can constitutionally be construed as having a meaning that covers material that is not legally "obscene," the Commission's definition of "indecent" still could not be sustained. Section 1464 is a criminal statute. Therefore, the Commission is clearly bound by the definition which the courts have given to "indecent" when it construes and applies that term. *FCC* v. *American Broadcasting Co.,* 347 U.S. 284 (1954).

The principles of statutory construction set forth in *American Broadcasting Company* are directly applicable to this case. The *American Broadcasting Company* case involved the validity of rules which the Commission had adopted banning the broadcast of give-away programs on the grounds that such programs violated Section 1304 of the Criminal Code (18 U.S.C. § 1304) which prohibits the broadcast of lotteries. This Court recognized that the Commission had the power, concurrently with the Department of Justice, to enforce Section 1304 and stated that it was, therefore, altogether proper for the Commission to adopt "interpretive regulations defining the prohibited conduct with greater clarity." 347 U.S. at 289-90 n. 7. The Court held, however, that the Commission's power to adopt interpretive rules is limited by the scope of the statute and that "[u]nless the 'give-away' programs involved here are illegal under § 1304, the Commission cannot employ the statute to make them so by

agency action." *Id.* at 290. Being unable to find any guidance in the terms of the statute or its legislative history as to whether the give-away programs involved sufficient consideration to bring them within the scope of the statute, the Court found it necessary to look to "American decisions, both judicial and administrative, construing comparable antilottery legislation." *Id.* at 292. Based upon a review of such decisions, the Court concluded that "it would be stretching the statute to the breaking point to give it an interpretation that would make such programs [as affected by the rules in question] a crime." *Id.* at 294. The Court then pointed out that acceptance of the Commission's construction of Section 1304 which lacked case support "would do violence to the well-established principle that penal statutes are to be construed strictly." *Id.* at 296. It, therefore, held that, despite the Commission's belief that give-away programs "should be struck down as illegal devices appealing to cupidity and the gambling spirit," the Commission had "overstepped the boundaries of interpretation and hence [had] exceeded its rule-making power" by attempting to deal with such programs through "administrative expansion of § 1304." *Id.* at 296-97.

Applying the principles of *American Broadcasting Company* to the instant case, it is clear that the Commission "has overstepped the boundaries of interpretation and hence has exceeded its . . . power" by formulating a definition of the term "indecent" as used in Section 1464 which eliminates entirely the element of "appeal to prurient interest." The term "indecent" has been employed in federal and state statutes regulating material and utterances of an obscene or patently offensive nature since at least the latter part of the

last century. Over the years, the federal and state courts have had frequent opportunities to consider the meaning of the term as used in such statutes. The courts have invariably held that "indecent" refers to material which is of such a lewd or lascivious nature as to have a tendency to excite libidinous thoughts or deeds—*i.e.*, material which is now generally decribed as "appealing to prurient interest"—as distinguished from material that is merely crude, coarse, vulgar, profane or opprobrious.[28] The Commission's *Order* un-

[28] *See, e.g., Manual Enterprises, Inc.* v. *Day*, 370 U.S. 478, 482-83 (1962); *Roth* v. *United States*, 354 U.S. 476 (1957); *Dunlop* v. *United States*, 165 U.S. 486, 500-01 (1897); *Swearinger* v. *United States*, 161 U.S. 446, 450-51 (1896); *Walker* v. *Dillard*, 523 F.2d 3 (4th Cir.), *cert. denied*, 423 U.S. 906 (1975); *Flying Eagle Publications, Inc.* v. *United States*, 273 F.2d 799, 803 (1st Cir. 1960); *United States* v. *Keller*, 259 F.2d 54 (3rd Cir. 1958); *Duncan* v. *United States*, 48 F.2d 128, 132-33 (9th Cir.), *cert. denied*, 283 U.S. 863 (1931); *United States* v. *Dennet*, 39 F.2d 564 (2d Cir. 1930); *Knowles* v. *United States*, 170 Fed. 409 (8th Cir. 1909); *United States* v. *Davidson*, 244 Fed. 523, 530-31 (N.D.N.Y. 1917); *United States* v. *Journal Co.*, 197 Fed. 415, 417-18 (E.D. Va. 1912); *United States* v. *Males*, 51 Fed. 41 (D. Ind. 1892); *In re Giannini*, 72 Cal. Rptr. 655, 446 P.2d 535 (1968); *State* v. *Locks*, 97 Ariz. 148, 397 P.2d 949 (1964); *State* v. *Christine*, 239 La. 259, 118 So. 2d 403, 408 (1960); *State* v. *Settle*, 90 R.I. 195, 156 A.2d 921 (1959); *Sunshine Book Co.* v. *McCaffrey*, 112 N.Y.S. 2d 476, 483 (Sup. Ct. 1952); *People* v. *Wepplo*, 78 Cal. App. 2d 959, 178 P.2d 853, 855 (1947).

Duncan v. *United States, supra*, involved an appeal from a conviction for broadcasting "obscene, indecent and profane" language over a radio station in violation of Section 29 of the Federal Radio Act of 1927 (47 U.S.C. § 109), the section from which Section 1464 is directly derived. Based upon a review of cases interpreting other federal statutes aimed at controlling obscene and indecent material, the *Duncan* court held that language which "is vulgar, scurrilous, and indecent in the popular sense of the term . . . is not obscene or indecent within the meaning of those terms as universally applied in the administration of the criminal law with reference to the use

equivocally declares that the definition of "indecent" language formulated therein "is distinguished from obscene language in that . . . it lacks the element of appeal to the prurient interest . . . ." (App. 15, ¶ 11).[29]

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of obscene and indecent language" unless the language "would arouse lewd or lascivious thought in the minds of those hearing or reading" it. *Id.* at 132. Although the Commission notes that a subsequent case rejected an argument that *Duncan* had equated indecency with obscenity for purposes of Section 1464 (Pet. Br. 6 n. 3), the Commission makes no attempt to reconcile with *Duncan* a definition of "indecent" which does not include prurience.

[29] In *Eastern Educational Radio*, 24 FCC 2d 408, 412-13, ¶¶ 10 & 13 (1970), the Commission defined "indecent" for the purposes of carrying out its responsibilities under Section 1464 and its obligation to regulate broadcasting in the public interest as referring to material which is both "(a) patently offensive by contemporary community standards; and (b) . . . utterly without redeeming social value." In its *Order*, the Commission expressly abandoned this definition which was based upon two of the three elements of the obscenity test which this Court had formulated in a line of cases culminating with *Memoirs* v. *Massachusetts*, 383 U.S. 413 (1966) and substituted a definition tied only to the single element of patent offensiveness. (App. 14-15, ¶ 11). The Commission explained in its *Order* that it had taken this action in view of the fact that "the Supreme Court in *Miller* v. *California*, 413 U.S. 15 (1973) reformulated the definition of obscenity which had provided the basis for our definition of indecency" in *Eastern Educational Radio*. (App. 7, ¶ 2). The Commission's reliance on *Miller* was clearly misplaced. In *Miller*, the Court set forth "concrete guidelines to isolate 'hard core' pornography from expression protected by the First Amendment." 413 U.S. at 29. The Court emphasized that the permissible scope of regulation must be limited to materials "which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." *Id.* at 24. Significantly, the Commission in its brief to this Court no longer cites *Miller* as providing a justification for its having eliminated the requirement of "utterly without redeeming social value" from its definition of "indecent." But the Commission also makes no effort whatsoever to justify the elimination of that requirement, or its equivalent formulation as set forth in *Miller*.

Accordingly, since the Commission's definition of the term "indecent" is utterly without "support in the decided cases," Section 1464 cannot provide a basis on which the Commission's *Order* can be sustained.

III. The Commission's Order Cannot Be Sustained As A Legitimate Exercise Of Its Authority To Regulate Broadcasting In The "Public Interest."

Although the arguments advanced by the Commission in its brief to this Court are substantially the same as those which it relied upon in its original *Order*, the Commission's position has shifted in one notable respect. In its *Order*, the Commission maintained that its authority to regulate "indecent" language was derived from two independent statutory provisions—Section 1464 of the Criminal Code (18 U.S.C. § 1464) and Section 303(g) of the Communications Act of 1934 (47 U.S.C. § 303(g)), as amended, the latter of which charges the Commission with the affirmative duty to "encourage the larger and more effective use of radio in the public interest." (App. 11 & 18, ¶¶ 7 & 16). As originally developed in its *Order*, the Commission's argument was as follows: First, that the existing judicial interpretation of the term "indecent" as used in Section 1464 did not preclude the Commission from giving that term a separate and distinct meaning from the terms "obscene" and, secondly, that "unique qualities" or "peculiar characteristics" of the broadcasting medium provided a basis for action by the Commission to expunge "indecent" language under the "public interest" standard of Section 303(g). In its brief to this Court, the Commission no longer places direct reliance on Section 303(g) as authority for its action. Rather, it now urges that the "unique qualities" of the broadcast media provide a basis for its construing the

Section 1464 term "indecent" in the manner set forth in its *Order*. Thus, while ostensibly abandoning direct reliance on Section 303(g), the Commission persists in relying upon the "public interest" arguments which it originally made on the basis of that section to support its contentions that its authority to regulate "indecent" language is derived from Section 1464.[30] Accordingly, the question of whether "public interest" considerations justify the Commission's action warrants separate consideration. The discussion which follows will show that the Commission's action cannot be sustained as a valid exercise of its obligation to regulate broadcasting in the public interest.

A. The Commission's Action Is Predicated Upon The Mistaken Belief That Specific Words Can Be Banned Without Restricting Freedom Of Expression.

The fundamental defect in the Commission's *Order* is that it is predicated upon the Commission's mistaken belief that certain words can be absolutely banned from the airwaves without limiting or inhibiting in any way the free expression in the broadcast medum.

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[30] The central role which the "public interest" standard plays in the Commission's theory of this case is evident from the fact that arguments predicated on the "public interest" dominate the Commission's brief (Pet. Br. 18 n. 19, 25, 30, 32, 34, 37-39, 45). It is further underscored by the Commission's framing of the questions presented for review. The first of the two questions identified by the Commission (Pet. Br. 2) is whether

> the peculiar characteristics of the broadcast media and the requirement that broadcast licensees operate their stations consistently with the public interest justify the prohibition of "indecent" language as a separate category from "obscene" language, for purposes of regulatory action.

In fact, while asserting that it was obligated by Section 303(g) to take action to prevent the "widespread use of indecent language on the public's airwaves" from "critically impair[ing] broadcasting as an effective mode of expression and communication," the Commission insisted that it was not its intention "to stifle robust, free debate on any of the controversial issues confronting our society" or to "modify [its] previous decisions recognizing broadcasters' broad discretion in the programming area." (App. 11 & 18, ¶¶ 7 & 16). The absurdity of the Commission's contention that it can ban particular words from artistic expression is readily apparent from even a superficial consideration of the range of expression affected by the Commission's *Order*.[31]

The incompatibility of any absolute ban on the use of specific words, no matter how offensive, with the First Amendment was made clear in *Cohen* v. *California*, 403 U.S. 15 (1971), and in a consistent line of cases since *Cohen*.[32] In these cases, this Court has emphasized that the Constitution forecloses governmental action which restrains or penalizes the public use of any particular word, or class of words, solely on the grounds of offensiveness. Since the question considered

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[31] *See, e.g.*, the compendium of literary, political and artistic works utilizing words proscribed by the *Order* set out in the Addendum to this brief.

[32] *Eaton* v. *City of Tulsa*, 415 U.S. 697 (1974); *Lewis* v. *New Orleans*, 415 U.S. 130 (1974); *Hess* v. *Indiana*, 414 U.S. 105 (1973); *Plummer* v. *City of Columbus*, 414 U.S. 2 (1973); *Papish* v. *Board of Curators*, 410 U.S. 667 (1973); *Brown* v. *Oklahoma*, 408 U.S. 914 (1972); *Rosenfeld* v. *New Jersey*, 408 U.S. 901 (1972); *Gooding* v. *Wilson*, 405 U.S. 518 (1972); *cf. Erznoznik* v. *City of Jacksonville*, 422 U.S. 205 (1975).

by this Court in *Cohen* is virtually identical to the question presented in this case, the Court's discussion of the constitutional considerations underlying its resolution of *Cohen* is of particular relevance.

Cohen involved a California statute which made it an offense for anyone to "maliciously and willfully disturb the peace or quiet of any neighborhood or person . . . by . . . offensive conduct . . . ." The conduct complained of was Cohen's action in walking through a corridor in the Los Angeles County Courthouse wearing a jacket on which were written the words "Fuck the Draft." People present in the corridor included women and children. 403 U.S. at 16. This Court stressed at the outset of its decision that "[t]he conviction quite clearly rests upon the asserted offensiveness of the *words* Cohen used to convey his message to the public," *id.* at 18 (emphasis in original), and it pointed out that in the context in which the words had been used it was obvious that they could not be punished on the theory that they were obscene or that they were "fighting words." *Id.* at 20. The Court then considered whether Cohen's conviction could be sustained either on the theory that "Cohen's distasteful mode of expression was thrust upon unwilling or unsuspecting viewers," *id.* at 21, or on the alternative ground that "California can excise, as 'offensive conduct,' one particular scurrilous epithet from the public discourse" upon a "general assertion that the States, acting as guardians of public morality, may properly remove this offensive word from the public vocabulary." *Id.* at 22-23. The

Court held that the State's action could not be sustained on either of these theories."

The Court rejected the State's contention that the use in public of offensive language could be proscribed in order to protect the sensibilities of persons who might otherwise be unwittingly exposed to it, stating:

> The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.
>
> In this regard, persons confronted with Cohen's jacket were in a quite different posture than, say, those subjected to the raucous emissions of sound trucks blaring outside their residences. Those in the Los Angeles Courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes.

Id. at 21. This Court's rejection of the theory that there was a sufficient governmental interest in maintaining "a suitable level of discourse within the body

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[23] The Court also considered and rejected as "plainly untenable" the theory that the use of a particular word could be proscribed because of the likelihood that its utterance would provoke a violent reaction. *Id.* at 23. The broadcast by a radio station of offensive words obviously cannot, under any conceivable circumstances, constitute the sort of "menacing" "verbal assault" that Justice Powell has suggested might be proscribed under a properly framed law as being tantamount to "fighting words." *Compare* the dissenting opinions of Justice Powell in *Plummer* v. *City of Columbus*, 414 U.S. 2, 3 (1973) and *Rosenfeld* v. *New Jersey*, 408 U.S. 901, 903 (1972) *with* the concurring opinions of Justice Powell in *Eaton* v. *City of Tulsa*, 415 U.S. 697, 700 (1974) and *Lewis* v. *New Orleans*, 415 U.S. 130, 134 (1974).

politic" to justify the proscription of the "unseemly expletive" in question was expressly based upon "the usual rule that governmental bodies may not prescribe the form or content of individual expression" unless the expression falls "within one or more of the various established exceptions" to this basic rule—*e.g.*, obscenity, "fighting words," invasion of privacy interests in an intolerable manner. *Id.* at 23-24. Although the reversal of Cohen's conviction was explicitly based upon the absence of any compelling governmental interest which could justify the regulation of offensive speech, this Court also based its decision on "certain more particularized considerations" which have long been held to bar governments from imposing any restrictions on expression based upon considerations of decency, morality or similarly subjective criteria. *Id.* at 25-26.

First, this Court noted that the principle asserted by California in support of Cohen's conviction is "inherently boundless" in that it presents no readily ascertainable general principle for distinguishing the word written on Cohen's jacket from any other offensive word and thus, if the State's justification for its action were sustained, it would leave the State free "to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us."[34] *Id.* at 25. Second, this Court pointed out that it could not

[34] This Court has consistently struck down as unconstitutionally boundless all similar attempts at the regulation of expression in the interest of protecting public decency, morality, or spirituality. *See, e.g., Erznoznik* v. *City of Jacksonville*, 422 U.S. 205 (1975); *Papish* v. *Board of Curators*, 410 U.S. 667 (1973); *Interstate Circuit, Inc.* v. *City of Dallas*, 390 U.S. 676 (1968); *Kingsley Pictures Corp.* v. *Regents*, 360 U.S. 684 (1959); *Holmby Productions, Inc.* v. *Vaughn*, 350 U.S. 870 (1955); *Commercial Pictures Corp.* v. *Regents*, 346 U.S. 587 (1954); *Gelling* v. *Texas*, 343 U.S. 960 (1952); *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495 (1952); *Winters* v. *New York*, 333 U.S. 507 (1948); *Musser* v. *Utah*, 333 U.S. 95 (1948).

> overlook the fact . . . well illustrated by the episode involved here, that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.

Id. at 25-26.[35] Finally, this Court noted, *id.* at 26, that were it to

> indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process[,] . . . governments might soon seize upon the censor-

[35] Decisions of this Court both prior to and since *Cohen* firmly establish that it is not possible to uphold any regulation which sweeps within its ambit speech which involves an emotive element which may shock or offend the sensibilities of some unsuspecting hearers, but which does not threaten any more important societal interest than the protection of people's sensibilities. *Eaton* v. *City of Tulsa*, 415 U.S. 697 (1974); *Lewis* v. *New Orleans*, 415 U.S. 130 (1974); *Brown* v. *Oklahoma*, 408 U.S. 914 (1972); *Rosenfeld* v. *New Jersey*, 408 U.S. 901 (1972); *Bachellar* v. *Maryland*, 397 U.S. 564 (1970); *Terminiello* v. *Chicago*, 337 U.S. 1 (1949).

ship of particular words as a convenient guise for banning the expression of unpopular views.[36]

The fatal defect in the Commission's *Order* is that it totally ignores the lesson of *Cohen*. In attempting to cleanse broadcast speech to a point where it will be palatable to the most sensitive of listeners, the Commission has formulated a definition of "indecent" which is as "inherently boundless" as the proscription of "offensive conduct" struck down in *Cohen*. Not only does the Commission's definition of "indecent" fail to present a readily ascertainable principle for distinguishing the seven words used in the Carlin monologue from other offensive words, but once there is an acceptance of the rationale of protecting the sensibilities of the public which underlies the Commission's action, there is no readily ascertainable principle which would prevent the Commission from acting to protect the public from any other forms of expression which might offend. That the *Order* does not present a readily ascertainable standard for judging which words come within its definition of "indecent" is conceded by the Commission itself when it argues (Pet.

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[36] The impossibility of imposing a flat ban on particular words without simultaneously suppressing the expression of ideas has been illustrated in a number of court decisions considering governmental attempts to regulate the very sort of words proscribed by the Commission's *Order*. *See, e.g., Bazaar* v. *Fortune*, 476 F.2d 570, *modified per curiam*, 489 F.2d 225 (5th Cir. 1973), *cert. denied*, 416 U.S. 995 (1974); *Keefe* v. *Geanakos*, 418 F.2d 359 (1st Cir. 1969); *Grove Press, Inc.* v. *Christenberry*, 276 F.2d 433 (2d Cir. 1960); *Mailloux* v. *Kiley*, 323 F. Supp. 1387 (D. Mass.), *aff'd per curiam*, 448 F.2d 1242 (1st Cir. 1971); *Parducci* v. *Rutland*, 316 F. Supp. 352 (M.D. Ala. 1970); *United States* v. *One Book Called "Ulysses,"* 5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705 (2d Cir. 1934); *Lindros* v. *Governing Board*, 9 Cal. 3d 524, 510 P.2d 361, *cert. denied*, 414 U.S. 1112 (1973).

Br. 21 n.21 & 43-44) that the court below erred in considering the effect of the *Order*, on materials other than the Carlin monologue and suggests that, since the *Order* itself does not provide sufficient guidance to enable licensees to determine which words come within its definition of "indecent," licensees should parade every questionable word before the Commission for its *nihil obstat imprimatur*. A position more clearly in contravention of the "no censorship" provision of Section 326 of the Communications Act and the First Amendment to the Constitution can hardly be imagined.

B. The "Unique Qualities" of the Broadcast Medium Do Not Provide A Basis On Which To Sustain The Commission's Action.

The Commission states that it is not unmindful of "*Cohen* . . . and its progeny" but contends that *Cohen* and the cases following it are distinguishable from the instant case because they "did not deal with the broadcast media, which for the reasons articulated by the Commission require the recognition of other conflicting interests." (Pet. Br. 46-47). This contention rests on the Commission's belief that there are "unique qualities" of radio which permit expression in the broadcast media to be subjected to different First Amendment standards than are applicable to expression in other media. This "variable impact" argument is directly at odds with this Court's teaching that although "[e]ach method of [expression] tends to present its own peculiar problems[,] . . . the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary." *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 503 (1952). *Accord, South-*

eastern Promotions, Ltd. v. *Conrad,* 420 U.S. 546, 557-58 (1975). Neither *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367 (1969) nor *Capital Broadcasting Company* v. *Mitchell,* 333 F. Supp. 582 (D. D.C. 1971), *aff'd sub nom. Capital Broadcasting Company* v. *Acting Attorney General,* 405 U.S. 1000 (1972), the two cases primarily relied upon by the Commission as providing support for its "variable impact" argument, is inconsistent with the doctrine just quoted and, thus, neither case supports the Commission's position.

Red Lion held that the Commission's Fairness Doctrine, requiring broadcasters who express one point of view on controversial issues to provide time for the expression of responsible opposing points of view, does not violate the First Amendment. The Commission's general assertion that this principle somehow authorizes the Commission to carve out such exceptions from the First Amendment as it deems necessary or appropriate is totally groundless. Noting the limited availability of spectrum space, this Court balanced the interest of the listening public in receiving diverse viewpoints against the interest of the broadcaster in selecting the material to be broadcast and preferred the former. The Court specifically based its holding on the need for achieving the broadest possible allocation of a scarce resource. In essence, the Court was making a departure from the application of the First Amendment to other media where scarcity is not a factor in order better to achieve the Amendment's objectives in a medium where scarcity is inevitably present. The Commission's regulatory authority in that regard is not unlike that permitted local governments in administering the use of streets and parks. Because these resources are limited, they are held in trust for the public by the government, which may promulgate regulations to accommodate competing interests in their use. The government may issue permits for the use of public property or may, in the proper circumstances, forbid the use of particular locations altogether for the purposes of speech, but any regulation which it employs must be *neutral* with respect to the content of speech. *Police Department of Chicago* v. *Mosley,* 408 U.S. 92 (1972); *Shuttlesworth* v. *City of Birmingham,* 394 U.S. 147 (1969). *See also Southeastern Promotions, Ltd.* v. *Conrad,* 420 U.S. 546, 554-55 (1975). Likewise, any action taken by the Commission which affects constitutionally protected speech must be neutral as to specific content. *See Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U.S. 94, 162-63 (1973) (Douglas, J., concurring)."

Red Lion and the scarcity rationale on which this Court's decision in that case was based do not by any means constitute blanket authorization for the Commission to ignore Section 326 of the Communications Act and promulgate rules regulating content in the "public interest." The situation involved in *Red Lion* was vastly different from the situation here. *Red Lion* indicates that spectrum scarcity justifies only the requirement that broadcasters afford opportunity for the presentation of conflicting views on controversial issues of public importance. The instant *Order*, however, represents a classic case of censorship, a *limiting* of the material which will gain access to the pub-

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[37] The Commission's action is not a neutral "time, place or manner" regulation, since the factor triggering the proscription, the "operative distinction," is the language, the very content, of the material to be broadcast. *Cf. Police Dept. of Chicago* v. *Mosley,* 408 U.S. 92, 95 (1972).

lic airwaves. The Supreme Court explicitly recognized this distinction in *Red Lion:*

> There is no question here of the Commission's refusal to permit the broadcaster to carry a particular program or to publish his own views; of a discriminatory refusal to require the licensee to broadcast certain views which have been denied access to the airwaves; of government censorship of a particular program contrary to § 326; or of the official government view dominating public broadcasting. Such questions would raise more serious First Amendment issues.

395 U.S. at 396. Thus, whatever greater measure of governmental regulation of broadcasting may be permissible relative to other media under the *Red Lion* "scarcity" rationale, that rationale cannot justify the Commission's action which serves to lessen the number of available voices, and thus aggravates, rather than alleviates, the problem of scarcity.

Capital Broadcasting similarly offers the Commission no support. *Capital Broadcasting* involved a challenge by broadcasters to a federal law which prohibited the broadcast advertising of cigarettes. *See* 15 U.S.C. § 1335. A majority of the three-judge district court convened to hear the case rejected the broadcasters' First Amendment claims, finding that nothing more than commercial speech was involved. 333 F. Supp. at 584-85.[38] The majority, on the basis of its conclusion that only unprotected commercial speech was being abridged, specifically stated that "Congress has the

[38] *Capital Broadcasting* was decided prior to this Court's recent decisions which appear to elevate "commercial speech" to a protected status. *See Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Bates* v. *State Bar of Arizona*, 97 S.Ct. 2691 (1977).

power to prohibit the advertising of cigarettes in *any* media." *Id.* at 584 (emphasis added). Having determined that the First Amendment did not bar Congress from prohibiting *all* cigarette advertising, the court then considered the question of whether Congress could, under the Fifth Amendment, properly limit application of such a prohibition to only the broadcast medium, rather than all media. The court found that Congress had a rational basis for so distinguishing between different media. The question presented here, however, is different. In this case, the Commission's action fails the threshold test—whether the action would be unconstitutional under the First Amendment if applied to any medium. Thus, the holding in *Capital Broadcasting* is inapposite to this case."

[39] Although in a footnote to its brief (Pet. Br. 30 n. 24), the Commission cites six cases in addition to *Red Lion* and *Capital Broadcasting* as providing support for its proposition that "this Court has recognized, in a long line of cases, that broadcasting is different from other media of communications for some regulatory purposes," only *Red Lion* and *Capital Broadcasting* actually provide any independent analysis of the scope of permissible governmental regulation of broadcasting. The remaining cases cited in the Commission's footnote 24 provide no analysis relative to the issue at hand. *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973) and *Buckley* v. *Valeo*, 424 U.S. 1 (1976) merely cite *Red Lion* for the proposition that the obligations imposed on broadcast licensees by the Commission's Fairness Doctrine are consistent with the First Amendment. Neither *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974) nor *Mills* v. *Alabama*, 384 U.S. 214 (1966) even refers to the regulation of broadcasting. Both cases relate to state statutes, found by this Court to be unconstitutional, which sought to impose upon newspaper publishers obligations comparable to those of the Commission's Fairness Doctrine and personal attack rules. *Bates* v. *State Bar of Arizona*, 97 S.Ct. 2691 (1977), wherein the Court found certain restrictions imposed by a bar association on advertising by attorneys to be unconstitutional, cites *Capital* without discussion. Similarly,

In addition to its assertion of general authority, arising particularly from the scarcity of radio spectrum space, to ignore traditional dictates of the First Amendment, the Commission cites three further "peculiar characteristics" of broadcasting which, it asserts, justify its ban on "indecent" language. These characteristics are: (1) the frequent presence of unsupervised children in the audience; (2) the fact that radio enters the privacy of the home; and (3) the fact that unconsenting adults may tune in a station without warning that offensive language may be broadcast. None of these considerations distinguishes the broadcast medium from other media in any way which justifies the application of a special First Amendment standard to this case.

(1) *Presence of Children in the Radio Audience*

The argument advanced most insistently by the Commission is that the prohibition of non-obscene language may be justified on the basis of the frequent presence of unsupervised children in the radio audience—a "peculiar characteristic" of the medium, according to the Commission—and the perceived societal interest in avoiding "exposure of children to language which most parents regard as inappropriate for them to hear." (App. 14, ¶ 11). In so arguing, the Commission has misinterpreted the First Amendment principles applicable to the evaluation of material with respect to minors, has misconceived the nature of the relation-

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Pittsburgh Press Co. v. *Human Relations Comm'n*, 413 U.S. 376 (1973), wherein this Court upheld an ordinance prohibiting newspapers from classifying help wanted advertisements by sex, cites *Capital* without substantial elaboration.

ship between the parent and state and finally has offered no evidence tending to show the validity of the statements of "fact" upon which it relies. More fundamentally, however, the Commission has ignored a basic aspect of First Amendment doctrine—the evil of overbreadth.

(a) The Overbreadth of the Commission's Standard Will Reduce the Content of Radio and Television to the Level of Children

The Commission insists that its action was not overbroad. But it fails to perceive that, although its regulation was intended to protect children, the effect of the regulation is to prohibit, *absolutely*, the dissemination of material because it might come into contact with children. Such complete censorship of material based on its presumed unsuitability for children is a classic example of unconstitutional overbreadth. This Court has recognized the danger of such overbreadth in overturning a state statute absolutely forbidding the publication, sale or distribution of books and other materials which were inappropriate for minors:

> The State insists that, by thus quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare. Surely, this is to burn the house to roast the pig. . . .
>
> . . . The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children. It thereby arbitrarily curtails one of those liberties of the individual, now enshrined in the Due Process Clause of the Fourteenth Amendment, that history has attested as the indispensable conditions for the maintenance and progress of a free society.

Butler v. *Michigan,* 352 U.S. 380, 383-84 (1957). *Accord, United States* v. *Pellegrino,* 467 F.2d 41 (9th Cir. 1972); *United States* v. *Levine,* 83 F.2d 156 (2d Cir. 1936).[40] If the Commission's *Order* were to be up-

[40] The Commission makes no effort in its *Order* or elsewhere to show that the radio and television audience is ever composed exclusively or even predominantly of children. Nor does it attempt to show the relative composition of radio and television audiences as between adults and children during various portions of the day. The well known facts are that radio and television audiences are in a constant state of flux. There is no period of the day or night when audiences do not include substantial numbers of adults and, *per contra,* there are few, if any, time periods which do not have some children in the audience. Indeed, the Fall, 1976 RADAR Report on Radio Usage, prepared by Statistical Research, Inc., on the basis of nation-wide surveys conducted in March-April, 1976 and September-October, 1976, estimates that, during an average day, more than 2,900,000 minors between the ages of 12-17 listened to the radio at some time between the hours of midnight and 6:00 a.m. Statistical Research, Inc., *Supplemental Report on Radio Usage,* 1 (Fall, 1976). The RADAR Report, which breaks each day into five "dayparts," further estimates that while, of all the dayparts, the audience of 12-17 year olds was least during the midnight-6:00 a.m. daypart, the next *lowest* daypart in terms of that particular audience was 10:00 a.m.-3:00 p.m., the period during which the Carlin monologue was broadcast by WBAI. *Id.* With respect to television, the Arbitron Television audience estimates for the New York market —the market in which WBAI is located—compiled on the basis of surveys taken in November, 1977, indicate that more than 300,000 minors between the ages of 2-17 were in the New York television audience during an average quarter-hour period between 11:30 p.m.-1:00 a.m., Monday through Friday. Arbitron Television, *Audience Estimates in the Arbitron Market of New York,* 4, 9-11 (November, 1977). Of these, more than 75,000 were estimated to be between the ages of 2-11. *Id.* Moreover, the RADAR Report estimates that, on an average day, listeners in the 12-17 year old age group are most likely to be listening to radio in the home, where parents will have a far greater opportunity to control what their children hear than they will to control what their children are exposed to on the street or in the classroom or library. *Supplemental Report on Radio Usage, supra* at 17-19. Of course, television sets

held, its substantial overbreadth would similarly assure the lowering of the content of all radio and television broadcasts to the level of children, a result which is constitutionally impermissible.

Without even citing *Butler,* the Commission argues that its regulation avoids the absolute prohibition of speech by merely "channeling" it. (Pet. Br. 28). *Young* v. *American Mini Theaters, Inc.,* 427 U.S. 50 (1976), is cited in support of this "channeling" concept. That case, however, is inapposite. *Young* involved a Detroit zoning ordinance which regulated the location of "adult theaters." This Court upheld the ordinance, finding that it was nothing more than a zoning regulation based on the city's well established interest in maintaining the character of its neighborhoods. Further, the regulation was found not to limit the total number of such theaters or greatly restrict access to them by interested members of the public. Indeed, Justice Stevens specifically noted that "[t]he situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech." 427 U.S. at 71 n. 35 (Stevens, J.). And, as noted by Justice Stevens, the trial court had

are also more likely to be viewed by children in the home. Thus, the material to which children are exposed on radio and television may be assumed to be subject to parental supervision to a far greater extent than much of the material to which children are likely to be exposed in other media. And, according to *Broadcasting* magazine, technology is now prepared to provide parents with a device which will permit them to "program" their home television set in advance so that it will only receive material selected by the parent, even in the parent's absence. *Broadcasting,* February 27, 1978, at 83. A copy of this article is contained at 20a in the Addendum to this brief.

found that there were "myriad locations" suitable for adult theaters available in Detroit. *Id.*

In the instant case, on the contrary, the regulation is a wide-ranging proscription the effect of which is to *suppress* protected speech. The Commission's action significantly—and purposefully—limits virtually any availability of the speech in question. Some broadcasters—for example, licensees of daytime-only stations[41]—will be absolutely prohibited from broadcasting material falling within the Commission's definition of "indecent." Unlimited-time stations which may still be able to broadcast such material will be able to do so only in late night and early morning hours, if then.[42] Moreover, such limitations will totally bar most adult audience members who have normal daily schedules from hearing over radio or television any material containing the language at issue. It is clear that this Court's holding in *Young*—based as it was on the fact that one desiring to see a particular movie would be able to do so without substantial inconvenience in the sections of the community allowed to show it—can hardly be read as authority for the vast censorship power here asserted by the Commission.

(b) Constitutional Principles Applicable to the Evaluation of Material With Respect to Minors

In addition to failing to perceive the substantial overbreadth of its action, the Commission has, in its *Order* and its brief to this Court, misinterpreted the First Amendment principles applicable to the substan-

[41] Others in this group include share-time operators and licensees who do not choose to broadcast all night long.

[42] *See* note 40, *supra*.

tive evaluation of material even with respect to minors. The Commission relies primarily on two opinions of this Court which, according to the Commission, support its position that the Commission may, consistently with the First Amendment, proscribe non-obscene speech in the interest of protecting children. (Pet. Br. 27). Those cases—*Miller* v. *California*, 413 U.S. 15 (1973) and *Ginsberg* v. *New York*, 390 U.S. 629 (1968)—do not so hold. Indeed, they tend to undercut the Commission's position. While, in both cases, the Court evidenced concern that children not be exposed to sexually explicit materials, it also evidenced concern for those substantial societal interests underlying the First Amendment guaranty of a free press. In order to reach an acceptable middle ground between these competing concerns, the Court approved a set of narrow standards permitting the limited regulation of a carefully defined class of material. *See, e.g., Ginsberg* v. *New York*, 390 U.S. at 646. In particular, the standards discussed in both *Miller* and *Ginsberg* specifically require the establishment both of the prurient nature of the work in question and the absence from the work, as a whole, of any literary, artistic, political or scientific value. *Id.* The Commission's definition of "indecent" does *not* permit consideration either of the prurient appeal *vel non* of the work (even in the case of adults) or of the overall context of the work. Additionally, the Commission's standard, although ostensibly tied to "sexual or excretory activities or organs," is not limited to "sexually explicit" material.[43] Rather, as discussed above at page 7, if a word, regardless of the

[43] The Commission recognizes that *Miller* and *Ginsberg* both relate to "sexually explicit materials." (Pet. Br. 27, 44). However, the Commission fails to note that its standard is in no way limited to such materials.

context in which it is used, has some meaning relating to sexual or excretory activities or organs, it is proscribed. The Commission's policy thus completely ignores the fact that even "minors are entitled to a significant measure of First Amendment protection . . . and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them." *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205 (1975).

The holding in *Erznoznik* is squarely in point. There this Court held unconstitutional a local ordinance in effect prohibiting the exhibition of motion pictures involving the human bare buttocks, human female bare breast or human bare pubic areas if such exhibition is visible from any public street or place. The validity of the ordinance was defended in part as a means of protecting youths from viewing such films. The Court rejected this defense, saying:

> [T]he restriction is broader than permissible. The ordinance is not directed against sexually explicit nudity, nor is it otherwise limited. Rather, it sweepingly forbids display of all films containing *any* uncovered buttocks or breasts, irrespective of context or pervasiveness. Thus it would bar a film containing a picture of a baby's buttocks, the nude body of a war victim, or scenes from a culture in which nudity is indigenous. The ordinance also might prohibit newsreel scenes of the opening of an art exhibit as well as shots of bathers on a beach. Clearly all nudity cannot be deemed obscene even as to minors. Nor can such a broad restriction be justified by any other governmental interest pertaining to minors. Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.

422 U.S. at 213-14 (citation and footnote omitted). Thus, the Commission cannot justify its proscription of non-obscene speech simply on the basis of its determination that such speech may be inappropriate for children.

(c) The Relationship Between Parent and State

The Commission has fundamentally misconstrued and misapplied the holdings of this Court relative to the relationship between the parent and the state. The Commission is, in effect, placing itself in the role of protector of parental interests as those interests were described by this Court in *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972). However, the Court in *Yoder* held that the state may not interfere with an Amish parent's decision not to send his children to secondary school for religious reasons. In doing so, the Court pointed out that the parent's role, *not* the state's, is primary in shaping a child's upbringing.[*] In attempting to dictate standards of "proper" language, the Commission is imposing its determination on parents and thus preventing them from exercising their own independent judgment in this area. As a result, the Commission is unconstitutionally intruding into the

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[*] This idea was expressed even more forcefully in *Pierce* v. *Society of Sisters,* 268 U.S. 510, 534-35 (1925), which held that a state could not require a child to attend public school:

> [The statute] unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. . . . The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

very zone of parental interests which, it asserts, it is attempting to protect.

(d) Lack of Evidentiary Support

The Commission offers absolutely no evidence in support of the societal interest in protecting children which is being asserted. For example, the Commission assumes, without the least support, that the words proscribed as "indecent" are words which "most parents regard as inappropriate for [children] to hear." (App. 14, ¶ 11). Secondly, in attempting in its *Order* to characterize the greater social harm which would, in its view, flow from the broadcast of "indecent" words, the Commission stated

> [o]bnoxious, gutter language describing [sexual and excretory activities and organs] has the effect of debasing and brutalizing human beings by reducing them to their mere bodily functions, and we believe that such words are indecent . . . .

(App. 15, ¶ 11). No factual support for this proposition has been offered.[45] This complete lack of evidentiary basis is particularly glaring in light of the fact that this Court has held that the harm which may occur from exposure to assertedly indecent language is in-

[45] As pointed out at pages 4-5, *supra*, it is ironic that, in the *Violence Report* to which the *Order* here in question was attached as an appendix, the Commission concluded that, despite the existence of what it regarded as substantial evidence supporting "the view that a steady stream of violence on television may have an adverse effect upon our society—and particularly on children," 51 FCC 2d 418, the First Amendment effectively precluded Commission action aimed at the regulation of televised violence. *Id.* at 420. Here, however, where no evidence of harm exists, the Commission feels free to exercise stifling censorship.

sufficient to render the speech unprotected. *See, e.g., Lewis* v. *New Orleans,* 415 U.S. 130 (1974) (calling a policeman a "motherfucker" is protected speech); *Cohen* v. *California,* 403 U.S. 15 (1971) (slogan "fuck the draft" on a jacket is protected speech). This is the rule even where children are present in the audience. *Rosenfeld* v. *New Jersey,* 408 U.S. 901 (1972) (conviction for saying "motherfucker" to audience, including women and children, remanded for consideration in light of *Cohen.* On remand, the conviction was reversed, and the portion of the statute making it a crime to use offensive language was struck down. *State* v. *Rosenfeld,* 62 N.J. 594, 303 A.2d 889 (1973)).[46]

In summary, the Commission's assertion that its prohibition of admittedly non-obscene speech is justified by the general societal interest in protecting children from exposure to such speech is totally erroneous. The Commission's action proscribing such speech merely serves to lower the content of all broadcast material to the level of the child, primarily because of the vagueness of the Commission's *Order.* This Court has strongly reaffirmed that regulation of speech designed to protect children must be very narrowly drawn. *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205 (1975). The regulation here fails that test.

[46] Although Justice Powell suggested in *Rosenfeld* v. *New Jersey,* 408 U.S. 901, 905-06 (1972) (dissenting opinion) that "the willful use of scurrilous language calculated to offend the sensibilities of an unwilling audience" might be proscribed under a properly framed law, he has pointed out that "[i]t may not be the content of the speech, as much as the deliberate 'verbal [or visual] assault' . . . that justifies proscription." *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205, 210-11 n. 6 (1975). *See also* note 33, *supra.*

(2) *Privacy of the Home and Protection of Unconsenting Adults*

In its *Order* the Commission advanced two additional societal interests the protection of which could, in the Commission's view, justify proscription of non-obscene speech. First, the Commission noted that radios are found in the home, "where individual rights to privacy are entitled to particular respect." (Pet. Br. 18; *see also* App. 13, ¶ 9). Second, it suggested that unconsenting adults might, on occasion, be confronted without warning with offensive language on the radio, and thus be a "captive audience" of sorts. These two interests are mentioned only in passing in the Commission's brief to this Court and there is almost no discussion of either point. Nonetheless, Pacifica will briefly consider them in order to demonstrate their inadequacies.

With respect to the general societal interest in the privacy of the home, the Commission relies primarily on *Rowan* v. *Post Office Department,* 397 U.S. 728 (1970). According to the Commission, *Rowan* indicates that "intolerable intrusion[s] on privacy" may be proscribed. (Pet. Br. 31). The Commission then suggests that the broadcast of indecent material, which may be received on radios in the home, is such an "intolerable intrusion." This reliance on *Rowan* is misplaced.

In *Rowan,* this Court upheld a statute, 39 U.S.C. § 4009,[47] which permits householders to require that mail advertisers stop sending them lewd or offensive materials and remove their names from mailing lists.

[47] This statute has since been re-numbered as 39 U.S.C. § 3008 pursuant to the Postal Reorganization Act, Pub. L. No. 91-375, 84 Stat. 719.

Under the statute, the householder is the sole judge of what is offensive to him; no government officer is authorized to screen mail or make any determinations as to offensiveness *vel non.* The role of the government is simply to effectuate the expressed desires of the individual citizen, while permitting the mailer to communicate at will to those who do not actively choose not to receive his message.

The function and effect of the *Order* promulgated by the Commission here are very different. Here the government is not a conduit for the expression of a private citizen's desire, but takes an active censor's role. In *Rowan,* the citizen's right to choose what he will receive in his own home is held to be paramount. The Court, in fact, likened the citizen's act of choosing not to receive the mail to a radio or television viewer's act of "twist[ing] the dial to cut off an offensive or boring communication and thus bar its entering his home." 397 U.S. at 737. Under the Commission's *Order,* however, the viewer has no choice. The Commission has already twisted his dial; he has no right to choose to hear the forbidden words. Likewise, the broadcaster is not granted the right to continue to broadcast the words to a consenting audience. Where a householder has alternative means of protecting his privacy, such absolute prohibition of communication will not be permitted. *See Martin* v. *City of Struthers,* 319 U.S. 141, 146-47 (1943) (ordinance forbidding door-to-door distribution of information held unconstitutional).[48]

[48] In *Martin,* this Court noted that a regulation forbidding the ringing of doorbells on homes properly posted with signs indicating an unwillingness to be disturbed would pass constitutional muster. *Martin* v. *City of Struthers,* 319 U.S. 141, 148 (1943).

The limits of *Rowan* are clearly demonstrated in a recent opinion by a three-judge district court finding unconstitutional in most respects 39 U.S.C. § 3011, a companion provision to that section upheld by this Court in *Rowan*. *United States* v. *Treatman*, 408 F. Supp. 944 (C.D. Cal. 1976). Section 3011 provided that the government could enjoin a mailer from mailing sexually oriented material to *anyone*, regardless of whether or not they had expressed any interest in receiving it, if it was found that the mailer had mailed such material to persons who had formally advised the Postal Service that they did not wish to receive such material. The effect of such a total injunction would thus be identical to the effect of the Commission's *Order*—the government could preclude *all* persons from receiving material if one person happened to be exposed to such material against his will. The three-judge district court found such total injunctive relief unconstitutional. The court was willing to uphold the statute to the extent that it would permit injunctions against mailing such materials to individuals who had specifically indicated that they did not want to receive it. This was as far as *Rowan* went. However, extension of the injunction to people who had expressed no opinion, or to those who had affirmatively solicited such matter, was held unconstitutional.

As *Treatman* suggests, *Rowan* is far too limited to support the Commission's blanket prohibition of "indecent" words. The government may have the authority to assure individuals of their ability to limit their exposure to that which they may find offensive. In *Rowan*, this ability was provided by the device of the Postal Service list; in the instant case, it is provided by both the on-off button and the channel selector. This, however, is the limit of that authority. Once the privacy interests of unconsenting individuals have been accommodated to this extent, those interests may not be advanced as a basis for action proscribing non-obscene speech.

In its *Order* the Commission briefly discusses a "captive audience" rationale, *i.e.*, the possibility that unconsenting adult listeners may be exposed to "indecent" material without warning. This basis is referred to only in passing in the Commission's brief. With respect to this rationale, it is sufficient to note that a radio may easily be turned off or tuned to another channel. An individual who may be offended by some material, far from being a "captive," has only to flip a switch in order to avoid the offending matter.[49] Thus, this rationale cannot support the Commission's asserted authority to censor non-obscene speech.

In summary, the interests of unwilling listeners in the privacy of their homes are already adequately protected by means which do not prevent willing listeners from gaining access to material they choose to hear. As a result, the Commission may not rely on an assertion of the interests of the unwilling listeners in order to justify a proscription of non-obscene programming protected by the First Amendment.

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[49] This Court has noted that radio is distinct from other media insofar as the "captive audience" rationale is applicable because "[t]he radio can be turned off, but not so the billboard or streetcar placard." *Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 302 (1974), *quoting Packer Corporation* v. *Utah*, 285 U.S. 105, 110 (1932). *See also Public Utilities Comm'n* v. *Pollack*, 343 U.S. 451, 469 (1962) (Douglas, J., dissenting): "One who tunes in on an offensive program at home can turn it off or tune in another station, as he wishes."

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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ADDENDUM

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Literary Works Containing Words Encompassed by the Commission's Definition of Indecent

THE BIBLE *(King James Version)*:

I Samuel 25:22: "So and more also do God unto the enemies of David, if I leave of all that *pertain* to him by the morning light any that pisseth against the wall."

I Samuel 25:34: ". . . surely there had not been left unto Nabal by the morning light any that pisseth against the wall.

I Kings 14:10 and II Kings 9:8: ". . . will cut off . . . him that pisseth against the wall . . . ."

II Kings 18:27 and Isaiah 36:12: ". . . hath he not sent me to the men which sit on the wall, that they may eat their own dung, and drink their own piss with you?"

Isaiah 32:12: "They shall lament for the teats,[1] for the pleasant fields, for the fruitful vine."

Ezekiel 23:3: "And they committed whoredoms in Egypt; they committed whoredoms in their youth; there were their breasts pressed, and there they bruised the teats of their virginity."

Ezekiel 23:21: "Thus tho calledst to remembrance the lewdnes of they youth in bruising they teats by the Egyptians for the paps of thy youth."

THE BIBLE *(Wyclif's Version 1382)*:

Luke 11:27: "Blessed be the teetis which thou hast sokun." [Cited in II *Compact Edition of the Oxford English Dictionary* 3248 (1971) ("OED").

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[1] The word "teat" is derived from the Old English word "tit" and "tit" is now a dialect form. *II Compact Edition of the Oxford English Dictionary* 3248 (1971).

SIR JOHN D. ASTLEY

Fifty Years of My Life (1894), Vol. II, p. 186: "I must tell you that Colonel A. Paget . . . had some jumpers . . . and amongst them a very promising young tit named Woodstock . . . ."

W. H. AUDEN

City Without Walls (1969), p. 49: "I'm so bored with the whole fucking crowd of you I could scream." [Cited in *Supplement to the Oxford English Dictionary* 1170 (1972) (*"OED Suppl."*).

SAMUEL BECKET

Malone Dies [Grove Press Edition (1958)], p. 273: "His young wife had abandoned all hope of bringing him to heel, by means of her cunt, that trump card of young wives."

p. 389: ". . . fucking awful business this . . . ."

p. 393: "Fuck off said Lemuel."

Malloy (1955), p. 69: "Fuck the son of a bitch." [Cited in OED Suppl., p. 1170].

PETER BECKFORD

Familiar Letters From Italy (1805), Vol. II, p. 186: "A bevy of young tits dressed out in a fantastic, blowzy style, drew their chairs around us . . . ."

F. J. BRITTEN

Watch and Clockmaking (1884), p. 129: "If the center is missed, a tit is formed which gives trouble." [Cited in OED, Vol. II, p. 3248].

ROBERT BURNS

"Holy Willie's Prayer" (1785), XIV: "To think how we stood, sweaten, shaken and pish'd wi' dread."

"Merry Muses of Caledonia" (c. 1800), *l.* 66: "For ilka hair upon her c--t/Was worth a royal ransom." [Cited in OED Suppl., p. 705].

l. 71: "you can fuck her where'er you please." [Cited in OED Suppl., p. 1170].

"Death and Dr. Hornbook" (1787), XIX: "Just shit in a kail-blade and send it."

LORD GEORGE GORDON BYRON

Childe Harold, IV, *l.* 88: "Mother of the mighty heart,/Which the great founder sucked from thy wild teat."

CAXTON

Fables of Aesop, X, xv: "I dyde shyte thre grete toordes. . . . The wulf . . . shote thryes by the waye for the grete fere that he had." [Cited in OED, Vol. II, p. 2791].

CHAUCER

"The Miller's Tale" (c. 1386), A text, *l.* 3806: "This Nicholas anon let flee a fart."

A text, *l.* 3798: "This Nicholas was risen to pisse."

A text, *l.* 3276: "And prively he caught her by her queynte."

"The Reeve's Tale" (c. 1386), A text, *l.* 4215: "And gang awake, and went hire out to pisse."

"The Wife of Bath's Prologue" (c. 1386), *l.* 729: "How Zantippe caste pisse upon his heed."

l. 443-4: "What eyleth you to grucche thus and grone? Is it for ye wolde have my queynte allone?"

"Madam's Song," Rel. Ant., I, *l.* 260: "Onys I fley and let a fart." [Cited in OED, Vol. I, p. 964].

JOHN DRYDEN

"The Hind and the Panther" (1687), *ll.* 1455-56: "The wanton boys wou'd piss upon your grave."

"The First Satire of Juvenal" *l.* 198: "Fit to be piss'd against and somewhat more."

"The Sixth Satire of Juvenal" *l.* 370: "Call for the pot, and like a man piss out."

"Persius" (1693), *l.* 109: "Thou writ'st not, but thou pissest poetry."

l. 218: "My harmless rhime shall 'scape the dire disgrace/Of Common-shoars, and ev'ry pissing place."

WILLIAM DUNBAR

Poems (1503), lxxv, *l.* 13: "Be his feiris he wald have fukkit." [Cited in OED Suppl., p. 1170].

HENRY FIELDING

Joseph Andrews (1742): "A long piss burnt beard." [Cited in OED, Vol. II, p. 2186].

DAVID FREEMAN

Creeps[1] (1971) (Folger Theater Manuscript), p. 7:

[1] *Creeps*, a play by and about cerebral palsy victims, was presented at the Folger Theater in Washington, D.C. as the opening production in its 1973-74 season. The Folger production was subsequently presented at Playhouse 2 in New York City. The play was reviewed in *The New York Times* by Clive Barnes (Theater Section, December 5, 1973) and by Walter Kerr (Arts and Leisure Section, December 16, 1973).

Sam: "Look Rembrandt, anything you ever tried to paint always looked like shit warmed over . . . It's chickenshit and you know it."

Tom: "You don't know the difference between a tree and a telephone pole."

Sam: "There's no difference. A dog'll piss on both of them."

Tom: "And you'll piss on anything, won't you."

Pete: "Okay, Tom, cool it!"

Tom: "Why the fuck should I cool it? This prick's attacking my art."

p. 11: ". . . let the fucker go!" ". . . tell old tight-cunt you're on the can, or something."

THOMAS GRAY

Works (1884 ed.), Vol. II, p. 59: "Now they are always in a sweat, and never speak, but they fart." [Cited in OED, Vol. I, p. 964].

GRAHAM GREEN

The Honorary Consul (1973), p. 279: "I don't want to see your fucking face ever again . . . . It was cheaper for you . . . not having to pay for your fucks."

DAVID HALBERSTAM

The Best and the Brightest (1972), p. 352: "But Johnson told his staff he wanted 'no more of this coup shit.'"

p. 423: "There were only three national concerns . . . [President Johnson] told reporters traveling with him on the plane. Everybody worries about war and peace. The men worry about heart attacks, and the women worry about cancer of the tit."

p. 436: "Of one Kennedy aide he [President Johnson] could say, 'He doesn't have enough sense to pour piss out of a boot with the instructions written on the heel.' Trying to get rid of J. Edgar Hoover and then finding it was simply too difficult, he admitted, 'Well it's probably better to have him inside the tent pissing out, than outside pissing in.' Asked by reporters why . . . he had not taken a particular speech of Vice-President Nixon's seriously, he said, 'Boys, I may not know much but I know the difference between chicken shit and chicken salad.'"

p. 532: "Hearing that one member of his Administration was becoming a dove on Vietnam, Johnson said, 'Hell, he has to squat to piss.'"

ROBERT HERRICK

"Hesperides" (c. 1648), *l.* 216: "The Farting tanner." [Cited in OED, Vol. I, p. 964].

ERNEST HEMINGWAY

Across the River and Into the Trees (1950), p. 58: "I'm a shit. . . . Now muck off."

p. 222: "We had more wire strung than there were cunts in Texas."

THOMAS HOBBES

Odyssey, VII, *l.* 88: "His Riches was a never-dying Teat."

BEN JONSON

Alchemist (1610), I, i, *l.* 2: "I fart at the."

I, iii, *l.* 28: ". . . wrapped up in greasy leather or piss'd clouts. . . ."

II, iii, *l.* 201: "With all your broths, your menstrues, and materials of piss and egg shells. . . ."

Every Man in His Humour (1598), III, iii: "A beggar, a slave that never drunk out of better than pisspot metal in his life."

JAMES JOYCE

Ulysses (1922), p. 61: "The grey sunken cunt of the world."

p. 580: "I'll wring the neck of any bugger says a word against my fucking King."

p. 587: "God fuck old Bennett."

p. 767: "His wife is fucked yes and damn well fucked too."

Portrait of the Artist as a Young Man (1916), p. 86: "That is horse piss and rotted straw, he thought."

p. 138: ". . . their swishing tails besmeared with stale shite. . . ."

p. 230: "The stout student . . . farted briefly."

JOHN KNOWLES

Indian Summer (1966), p. 19: "Anymore chickenshit. . . ." "Stick it up your ass."

WILLIAM LANGLAND

"Piers Plowman" (1362), A text, V. *l.* 190: "He pisside a potel in a *pater-noster* while."

A text, VII, *l.* 143: "A Bretoner, a braggere, a bostide hym also/And bad hym go pisse with his plouh. . . ."

D. H. LAWRENCE

Lady Chatterly's Lover (1928), Ch. XVI, p. 298: "If your sister there comes ter me for a bit o'cunt an'tenderness, she knows what she's after."

Ch. XVIII, p. 334: "I'm not just my lady's fucker, after all."

Ch. XVIII, p. 342: "A lily-livered hound with never a fuck in him."

MASSINGER

Maid of Honour (1632), IV, iv: "Tho' the devil fart fire, have at him." [Cited in OED, Vol. I, p. 964].

IRIS MURDOCH

Unofficial Rose (1962), Ch. VI, p. 56: "Not that I care a fuck."

THOMAS NASHE

The Unfortunate Traveller (1594), p. 56: "I was at Pontius Pilates house and pist against it." [Cited in OED, Vol. II, p. 2186].

JOHN O'HARA

From the Terrace (1958), p. 257: ". . . such a Goddam fuck up."

GEORGE ORWELL

Collected Essays (1968), I, p. 88: "Tell him he's a cunt from me." [Cited in OED Suppl., p. 705].

D. G. ROSSETTI

Selected Letters (1965), Vol. II, p. 743, Letter of 16 Sept. 1869: "If Byron fucked his sister he fucked her and there an end."

SIR WALTER SCOTT

Kenilworth (1883), Ch. XI, p. 120: " 'Pardon me,' replied Wayland, 'I have as good a tit as ever yeoman bestrode.' "

WILLIAM SHAKESPEARE

The Tempest, IV, i, *ll.* 199-200: "Monster, I do smell all-horse-piss; at which my nose is in great indignation."

Merry Wives of Windsor, V, v, *ll.* 12-16: ". . . for who can blame me to piss my tallow?"

Two Gentlemen of Verona, IV, iv, *ll.* 19-20: "He had not been there . . . a pissing while, but all the chamber smelt him."

Henry V, II, i, *ll.* 54-55: "Pistol's cock is up; and flashing will fire follow."

Henry VI, Part II, IV, vi, *ll.* 2-5: "I charge and command, that, of the city's cost, the pissing-conduit run nothing but claret wine this first year of our reign."

The Taming of the Shrew, II, i, *l.* 223-225:

Katharina: "What is your crest? a coxcomb?"

Petruchio: "A combless cock, so Kate will be my hen."

Katharina: "No cock of mine, you crow too like a craven."

Romeo and Juliet, II, iii, *ll.* 118-119: ". . . for the bawdy hand of the dial is now upon the prick of noon."

As You Like It, III, ii, *ll.* 112-113: "He that sweetest rose will find/must find love's prick and Rosalinde."

Titus Andronicus, II, iii, *l.* 145: "Even at thy teat thou had'st thy Tyranny."

G. TITO SHAW

He's Got a Jones[a] (1974) (Folger Theater Manuscript).

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[a] *He's Got a Jones,* a play dramatizing the Deep South in the 1930's by a black playwright, was presented at the Folger Theater

1-37: "An' this cocksucker was filthy rich. . . . I don't remember any of this cock and bullshit."

1-38: "Absofuckin'lutely!"

2-1-11: "Shit, 'taint none a my fault. . . . Shit . . ., jes mad 'cause of Gladys."

3-2: "Blowin' that shitty bref in my face! . . .— blowin' farts in a cloud of dust. . . ."

3-3: "Fuck him!"

3-5: "FUCK THE MAN! He don't tell me what I can do an' can't do."

3-10: " . . . 'cause ifen it was, how could that motha fuckah. . . ."

3-11: " . . . this *devil's ass-hole* weh live in! . . . an ifen I fines out who that chicken-shit pussy-whipped pigeon is. . . ."

JONATHAN SWIFT

"Corina" *l.* 23: "And how, when master went to piss, . . ."

"An Elegy on Mr. Partridge" *ll.* 75-76: "Whom Roguish Boys in Stormy Nights . . . / Torment by pissing out their Lights."

"An Excellent New Song" *l.* 18: "His Grace swore by God, and her Grace let a fart."

"The Problem" *l.* 20: "Tho' on a throne, wou'd fall to shite."

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in Washington, D.C. in February-March, 1975. The play was reviewed in the *Washington Post* by Richard L. Coe on February 11, 1975 (Style Section) and in the *Washington-Afro American* by Charles Farrow on February 22, 1975.

l. 36: "Spread all their Charms to catch a Fart."

l. 48: "He farted first, and then he spoke."

"The Lady's Dressing Room" *ll.* 115-118: "Repeating in his amorous fits / Oh! *Celia, Celia, Celia* shits!"

"Strephon and Chloe" *l.* 178: "Can *Chloe* heavenly *Chloe,* piss?"

"Tim and the Fables" *l.* 19: "By God says *Tim* (and let a fart). . . ."

DYLAN THOMAS

Selected Letters (1966), p. 208, Letter of August 31, 1938: "I've just had . . . a lawyer's list of the objectionable words, phrases, passages and whole chunks in my short stories. The word 'copulation' . . . pissed . . . and about 20 long passages, . . . none using obscene words, none . . . to do with fucking,— all have to go in the English edition."

JOHN UPDIKE

Couples (1968), Ch. 4, p. 294: "This fucks up our party, doesn't it?"

JOHN WILMOT, *Earl of Rochester*

"A Ramble in St. Jame's Park'" (c. 1680)

ll. 1-2: "Much wine had past with grave discourse, Of who fucks who, and who does worse."

l. 86: ". . . the savory scent of salt-swoln cunt, . . ."

"The Imperfect Enjoyment" (c. 1680), *ll.* 63-64: "Through all the town, the Common fucking post, On whom each whore relieves her tingling cunt. . . ."

"Signoir Dildo" (1703), *ll.* 33-34: "Our dainty time duchesses have got a trick, to dote on some fool for the sake of his prick."

ANGUS WILSON

Old Men at Zoo (1961), Ch. 5, *l.* 276: "We'll get you, you fucker, Barley was shouting." [Cited in OED Suppl., p. 1170].

ALFRED R. WALLACE

Island Life (1881), Ch. II, p. 20: "These are all the European tits, but there are many others. . . ."

Examples of the Use of Words Encompassed by the Commission's Definition of Indecent in Conversations Recorded on the White House Tapes.[1]

Page *Conversation of September 15, 1972*

p. 9 President: "I don't believe this crap."

Conversation of February 28, 1973

p. 29 President: "The balls of a brass monkey."

p. 37 President: "Gossip and bull shitting."

p. 45 President: "Colson's got brass balls. . . ."

Conversation of March 13, 1973

p. 55 President: "Bullshit. Bullshit."

p. 55 John Dean: "Total bullshit."

p. 56 President: "Would the FBI then turn on him, piss on him?"

p. 62 President: ". . . if we are involved in pissing on Johnson. . . ." "Bullshit."

p. 67 President: "All their face making and all that crap."

[1] Source: "Transcripts of Eight Recorded Presidential Conversations," Hearings Before the Committee on the Judiciary, House of Representatives, 93rd Cong., 2d Sess., May-June, 1974.

p. 70 President: ". . . the assholes . . . ."

p. 75 President: "Shit, it's not sinister." "As a matter of fact, it's just a bunch of crap."

Conversation of March 21, 1973 (A.M.)

p. 126 President: ". . . all sorts of shit'll break loose there."

Conversation of March 22, 1973

p. 150 Haldeman: "Baker was a little pissed-off."

p. 183 President: "I don't give a shit what happens."

Conversation of April 16, 1973 (A.M.)

p. 196 President: ". . . and all that crap."

p. 202 President: "Shit, I'm not going to let . . ."

Examples of the Use of Words Encompassed by the Commission's Definition of Indecent in Newspapers and Magazines

Berkeley Daily Gazette, Berkeley, California, "High Court Says it's OK to Use THAT Word," Tuesday, June 8, 1971, p. 1:

> "Addressing itself for the first time to the use of the word, the Court voted 5 to 4 to overturn the conviction of a man found wearing a jacket with the words 'Fuck the Draft' on it in the corridor of the Los Angeles courthouse."

The Journal Herald, Dayton, Ohio, "It was 'Like Any Other Monday' and Then . . . ," Wednesday, March 19, 1975, p. 1 (The editor's note introducing this article explains that the material is taken from a statement which was given to the assistant U.S. attorney by a man "who

during a quarrel, shot and killed his friend and colleague.''):

> ''And he started screaming at me. I mean his teeth were—his lips were drawn back over his teeth, and he was screaming at me. And he screamed something to the effect, 'Gibson, God damn it, you are fucking with my family. You are fucking with my future. I am not going to let you do it. I'll kill you first.' And when he was saying this the gun was coming up, and right in my face. . . . And when he said that I just grabbed the damn gun and pushed it . . . and there was a terrible roar, the damn gun went off. . . . And all I could think of was 'my god, he's going to kill me . . . hang on to that gun.' . . . The whole thing was microseconds. . . . I don't know whether I pulled my gun or not, but I was conscious of squeezing the trigger, just squeezing it again, and again, and again. . . .''

The Washington Post, Washington, D. C., ''Ford Gets Pessimistic Report,'' Sunday, April 6, 1975 at A18:

> ''The mood was bluntly, but accurately, reflected by White House photographer Kennerly who described his Vietnam trip as 'the worst thing that ever happened to me in my life. . . . It is really shitty, and you can quote me.' ''

Washington Star, Washington, D. C., ''CBS Rift Comes Out in the Open,'' July 14, 1975, at C-7:

> ''The matter might have been dropped, Rather said, if it hadn't been for the 'puff piece in Village Voice. It was gutsy Dan Schorr who stuck his neck out rather than cool it. The story was bullshit, obviously; there were no direct quotes.' ''

Esquire, July, 1970 (Sally Kempton, ''Cutting Loose''):

p. 1 ''In my adolescence I screwed a lot of guys I didn't much like. . . .''

p. 3 ''They would expend a little flattery to assure me that they regarded me as a cut above the other groupies, and then they suggested that we get down to balling.''

p. 5 ''I think I am becoming in many small ways a woman who takes no shit.''

Harpers Magazine, July, 1971 (Sara Davidson, ''The Rush for Instant Salvation''), pp. 47-48:

> ''Fred, who has been quiet for a time yells: 'I don't give a shit about this intensive! I don't give a shit about yoga. I don't give a shit about anything in my life!— . . . .'
>
> ''. . . From afar comes a feminine shriek: 'FUUUCK'. . . .
>
> ''. . . Roger who is a Zen student, shakes his head with disgust. 'All I've heard from them is bullshit.' ''

Harpers Magazine, July, 1970 (John Carry, ''Washington, Sex and Power''), p. 67:

> '' 'And if he still goes out and chases other women, then he's just a shit. . . .' ''

The Nation, April 6, 1970 (E. Goodheart, ''The Rhetoric of Violence''), p. 399:

> ''The operative words are 'pig,' 'bullshit,' 'motherfucker.' It is the language of left militant students. . . . The 'alma-mater fuckers'. . . .''

The New Republic, May 23, 1970 ("The Nixon Watch"), p. 11:

> ". . . [A] speaker yelled through the loudspeakers and over TV: FUCK RICHARD NIXON!"

New York Review, May 7, 1970 ("An Exchange on Sidney Hook"), p. 44:

> "It may well be that he believes *both* that militant negroes are justified in their militancy and that students are justified in calling their professors 'mother fuckers.' "

San Francisco Magazine, June, 1970 (Terry Link, "Black and White in Blue"), p. 16:

> "The kind of racism that has separated him from his fellow white officers is so commonplace that it's scarcely noticeable. . . . 'You drive down the street and the other guy says "Look at those fucking n-----s!" But they don't do that too much around me anymore.' "

Charles B. Seib

The Washington Post
April 16, 1975

'Dirty Words'

Every newspaper editor agonizes occasionally over whether to print dirty words. And most have found themselves in the uncomfortable position of using such ridiculous euphemisms as "barnyard epithet" (Time magazine once called it "the pastoral expletive") or "vulgar word for sexual intercourse" or playing fill-in-the-blanks with the reader, as in "b—t." Or in the more forthright but also uncomfortable position of having decided to print in its full glory a word that is bound to set off a storm of reader protest.

As society's restraints on bad language have slackened, the decisions on whether to print have become more difficult. Words once safely beyond the pale, no matter what the circumstances, must now be considered, and the sensitivities of a perhaps dwindling segment of readers must be weighed against the abstraction we call the public interest.

The rule followed on this paper and on many others is that taboo words—any child over the age of eight could assemble the list — are used only if necessary to the story. That is, they are printed if they convey to the reader an essential fact or element of mood, situation or personality that can be conveyed in no other way.

It is a sensible rule and a fairly simple one, but it isn't easy to apply. As The Post's resident gadfly, I objected recently to the use of a vulgarism (registering about 3 on an offensiveness scale of 5) in a story from Saigon. I felt it was a casual expletive, such as occurs often in conversation these days, and not necessary to convey the sense or the temper of the quotation in which it appeared. The editors who printed it had decided the other way, of course, under the same general rule.

Usually these decisions — and the protests that publication sometimes generates — are taken in stride. Troublesome as they can be, they do not rank among the major crises of the news business. But occasionally there is a forceful reminder of just how strong the remaining strands of taboo still are.

Which brings me to the case of Charles Alexander, until recently the editor of the Dayton (Ohio) Journal Herald and now at liberty.

Last month Alexander made one of those decisions. He had in hand a sensational document—the verbatim statement to authorities of a Treasury

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The writer is an associate editor of The Washington Post, serving as an internal "ombudsman." From time to time, he also writes a column of press criticism.

agent who had shot and killed a colleague during a bitter quarrel over which of them would get a transfer.

The agent's description of the climax of the quarrel, just before the shooting began, included that vulgar word for sexual intercourse.

Alexander printed the transcript across the top of page one of his newspaper, using the taboo word twice. The next day, after a confrontation with the paper's management, he offered his resignation. It was accepted. He explains that he was asked if he had approved the publication. "I said yes. They said it was indefensible. After that, resignation was the only proper thing to do."

There may have been other elements in that outcome, but the fact is that publication of a word known to every American, literate or illiterate, triggered the departure of a respected journalist from a respectable newspaper.

Before he left the Journal Herald, Alexander wrote and published a column in which he movingly made it clear—clearer than I could—that when editors consider taboo words, it isn't simply in terms of the cynical old newspaper question: "Well, shall we rattle their teacups?" So I will let him have the last words.

After recounting the circumstances in which the word was used, Alexander wrote:

"What the account of Carroll Gibson [the Treasury agent] tells us with a vividness that I would hope none of us or our children would forget is that killing in most cases is the final, but not the crucial act. The crux comes when the common love and respect we ought to have for each other dissolves into hate, and we turn the corner from passionate verbal combat or quarreling to mortal combat.

"Psychologists are fond of telling us how healthy it is to 'let it all hang out.' That's true only to a point. Then comes the moment of truth when we must decide whether we are men and women or animals of the jungle. Carroll Gibson's account is the story of two men who made the turn. Pure logic tells us that at some point there must be restraint or we will destroy ourselves —physically or mentally—in an irreversible act. The weapon can just as easily be an accelerator and steering wheel in the hand of an enraged driver as a gun.

"To me the telling of that message from an incident of real life, including in one instance the raw vulgarity used by a man blind with rage, is a lesson

that every man, woman and child should perceive in all its dimensions. It is shocking—it surely should be.

"The complaints we received had nothing to do with introducing a word into the culture, much less into the language. The objection was to putting it into print. I did not approve its publication lightly. I would have preferred to avoid it. As a matter of practice, it is not done at all on this newspaper unless it is deemed unavoidable. But if it seems unavoidable, I question that the basic cause of decency is served by playing euphemistic

The News Business

games. 'You don't have to print the word because everyone knows what goes in there anyway,' I was told by several callers.

"If its use in print contaminates children—and I am amazed at the number of children under 12 who, according to parents, read the paper from cover to cover—I would hope that parents would have the depth to realize that the real lesson here is not so much that the word in question is never used—children know better—but that intemperate language is often a prelude to intemperate behavior and tragedy. Language is the verbal expression of man's condition, not the source of it. Language is amoral.

"To view the story as a mere verbal account is to miss its deeper significance. In an era in which homicide is on an alarming rise, most of it resulting from arguments between members of the same family, or between friends and acquaintances, we wonder why the admonition that 'thou shalt not kill' is having so little impact. Is it because of vulgar language? Or might it be because we are so pre-occupied with the superficialities of life—the trappings—that we ponder only casually, if at all, the real meaning of the drama that goes on amid those trappings?

"Finally, those who say that one would never have seen such a word printed in full in a family newspaper five years ago are probably correct. It is not common now, although not unheard of. It is most uncommon in this newspaper. I think it will be unknown henceforth. I don't quarrel with that point of view. That is a proper editorial judgment and obviously the more inoffensive one.

"I am not a champion of dirty words. I am a champion of the press trying, as the opportunity presents itself, to give mankind a telling insight into its own frailty. Perhaps that comes from a sensitivity to my own. The essence of the news is the classic struggle of man to overcome his frailty and his search for order to aid in that struggle. I would hope we can view the implication openly."

Broadcasting
February 27, 1978
Page 83

Do-it-yourself censor. It looks like a pocket calculator, but the Video Protor, when hooked up to a standard TV channel selector, controls which shows can be seen on the set. With the Video Proctor, claims the designer, a parent, with the help of a weekly TV schedule, punches the keyboard, entering the day of the week, time, channel number and duration for each program the parent feels is acceptable for family viewing. It remembers all entries made and when the set is switched to a channel at a time when that channel was not entered, the screen remains blank and the audio silent, blocking out all other VHF and UHF channels and cable, TV games, cassettes and pay TV. The device has a lock. The Video Proctor, which will sell for between $50 and $60, computes for one week and can recycle that computation weekly. Alterations can be made at any time by the parent, who has the key. A product of Ray Dobson Creative Services, New York, it will be test marketed by September, then on the open market within a year, according to Mr. Dobson, who is negotiating the licensing of the Video Proctor with mailorder retailers.